Supreme Court, U.S.
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In the

Supreme Court of the United States

CLARA VARCO,

Petitioner,

v.

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

a) Whether the decision of the Seventh Circuit Court of Appeals conflicts with this Court's decision in *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), which denied federal subject matter jurisdiction under § 502(a)(3) of ERISA to a Plan Administrator seeking reimbursement for benefits from a participant who recovers money from a third party.

b) Whether the decision of the Seventh Circuit Court of Appeals conflicts with the decision of the Ninth Circuit Court of Appeals in *Westaff, Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003).

c) Whether the decision of the Seventh Circuit panel conflicts with other decisions of the Seventh Circuit Court of Appeals.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Clara Varco, is an individual citizen of the United States residing in the Northern District of Illinois. She has no corporate affiliations. Initially, Clara Varco was the plaintiff in a personal injury action in the Circuit Court of Cook County, which was removed to the Federal District Court for the Northern District of Illinois. After remand, she was the defendant in the proceedings in the Federal District Court for the Northern District of Illinois, and the appellant, and appellee, in two separate and consolidated appeals in the Seventh Circuit Court of Appeals.

Respondent

Respondent, Administrative Committee of Wal-Mart Stores Inc. Associates' Health and Welfare Plan, is a fiduciary of the ERISA plan providing health and retirement benefits to employees of Wal-Mart Stores, Inc. Petitioner is unaware if Wal-Mart Stores, Inc. owns or controls any portion of the plan. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of the Plan. The Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan was a self proclaimed "defendant" in Ms. Varco's personal injury lawsuit in the Circuit Court of Cook County, which it then removed to the Federal District Court for the Northern District of Illinois. Following remand, the Plan was the plaintiff in the proceedings in the Federal District Court for the Northern District of Illinois, and the appellee and appellant in separate and consolidated appeals in the Seventh Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the opinion of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit (App. B) was entered on July 29, 2003, and is reported at 338 F.3d 680 (7th Cir. 2003). The order denying petition for rehearing *en banc* (App. A) was entered by the Seventh Circuit Court of Appeals on August 22, 2003, and is reported at 2003 U.S. App. LEXIS 17772 (7th Cir. 2002). The opinion of the United States District Court for the Northern District of Illinois granting summary judgment to respondent (App. D) was issued on October 2, 2002, and it is reported at 2002 U.S. Dist. Lexis 18933 (N.D. Ill. 2002). The order of the United States District Court for the Northern District of Illinois, denying petitioner's motion to dismiss for lack of subject matter jurisdiction (App. E at 50-52) was entered on January 14, 2002, and is reported at 2002 U.S. Dist. Lexis 530, (N.D. Ill. 2002). The opinion of the United States District Court for the Northern District of Illinois, remanding the plan's removal of Varco's personal injury action (App. G) is reported as *Varco v. Lapsis*, 172 F. Supp. 2d 985 (N.D. Ill. 2001)

STATEMENT OF JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was entered on July 29, 2003. (App. B) The Court of Appeals entered an order denying a timely petition for rehearing *en banc* on August 22, 2003. (App. A). Justice Stevens granted an extension of time in which to file a Petition for a Writ of Certiorari to and including January 19, 2004.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The operative statutory provision, §502(a)(3) of the Employee Retirement Income Security Act of 1974, found at 29 U.S.C. § 1132(a)(3) provides:

> (a) Persons empowered to bring a civil action. A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT OF THE CASE

Clara Varco sustained injuries in an automobile collision in Orland Park, Illinois on September 24, 2000. She was and still is employed by Wal-Mart. As part of her employment, she was allowed to, and did participate in an ERISA qualified benefits plan which paid some of her medical bills related to the injury she received in the automobile collision. The Administrative Committee of the Wal-Mart Stores, Inc. Associates Health & Welfare Plan (the plan) provides health benefits to employees of Wal-Mart stores, and paid a total of $18,865.72 to various medical providers, for treatment related to Ms. Varco's injuries. (App. B at 3a- 4a)

Ms. Varco's attorney secured settlements totaling $100,000.00,[1] and thereafter her attorney filed a petition to adjudicate various liens and other claims against the settlement proceeds, including a claim for reimbursement by the plan. (App. B at 4a). The petition to adjudicate the liens was filed in the Circuit Court of Cook County, where Ms. Varco's personal injury lawsuit was pending (App. D at 28a; h). In response to the petition to adjudicate liens, the plan filed a Notice of Removal, identifying itself as a "defendant." (Appendix I). The Notice of Removal was remanded by Judge Alesia, for lack of subject matter jurisdiction. (App. G) *Varco v. Lapsis*, 172 F. Supp. 2d 985 (N.D. Ill. 2001).

While the petition to remand remained pending before Judge Alesia, the plan filed this action, alleging federal question subject matter jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1332, and § 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132. (App. F) The First Amended Verified Complaint alleged that Ms. Varco was a participant of the plan, that she was injured in a motor vehicle collision, and as a result, the plan paid medical benefits totaling $34,035.55.[2] The complaint further alleged that the plan's contract with Varco provided that the plan was entitled to reimbursement of those monies in the event Varco successfully recovered from another source. It was further alleged that Varco refused to reimburse the plan in accordance with the plan's terms. As a result, the plan sought to enforce

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[1] Varco initially accepted an offer of $20,000.00 from the tortfeasor's insurance carrier, and subsequently accepted from her own under-insured motorist coverage the remaining $80,000.00.

[2] The plan later admitted it had not paid $34,035.55, and filed an amended affidavit, claiming that it had paid $18, 865.72. (App. B at 5a)

the contract, by way of injunction, declaratory judgment, constructive trust or restitution, "requiring defendant Varco to turn over $34,035.55, including appropriate pre-judgment and post judgment interest." (App. F)

Subsequent to the filing of the First Amended Complaint, Varco filed a motion to dismiss, for among other reasons, lack of federal subject matter jurisdiction. In the interim, on January 8, 2002, this Court issued its opinion in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 202 (2002). Several days later, on January 14, 2002, Judge Lefkow issued a Memorandum Opinion denying Varco's motion to dismiss for lack of federal subject matter jurisdiction. (App. E at 47a-49a). Varco filed a timely interlocutory appeal. (App. B at 3a). Thereafter, the parties filed cross motions for summary judgment, and the District Court granted the plaintiff's motion for summary judgment, on October 10, 2002. (App. C) The order granting summary judgement found that the plan was entitled to reimbursement pursuant to the terms of the plan, (a fact which Varco never disputed[3]), but that in accordance with the Common Fund Doctrine, Varco was entitled to credits for the plan's pro-rata share of attorneys fees and costs attributable to the recovery. (App. D at 37a-40a)

Varco filed an interlocutory appeal of the decision issuing a preliminary injunction, and denying her motion to dismiss for lack of subject matter jurisdiction. (App B at 6a) After the trial court granted summary judgment, the plan appealed the finding that the Illinois Common Fund Doctrine applied to

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[3] Varco has never disputed her obligation to reimburse the plan. Her original petition to adjudicate liens and claims for reimbursement, merely sought to reduce those claims by each claimant's pro rata share of the attorneys fees and costs in accordance with the Common Fund Doctrine. (Appendix H).

the plan's claim for reimbursement. Those appeals were consolidated. (App. B at 7a) The panel below, in an opinion issued by the Seventh Circuit Court of Appeals affirmed the trial court's denial of Varco's motion to dismiss, and reversed the trial court's finding that the Illinois Common Fund Doctrine applied to an ERISA plan's suit to enforce its contractual right to reimbursement. (App. B)

REASONS FOR GRANTING THE PETITION

Few other issues relating to ERISA have been the subject of such relentless, and untiring efforts at establishing subject matter jurisdiction notwithstanding mounting precedent to the contrary. The important question at hand is whether § 502(a)(3) of the Employment Retirement Income Security Act grants federal question subject matter jurisdiction to an ERISA plan administrator's suit seeking reimbursement of monies recovered by one of its participants in a personal injury lawsuit. The federal courts of appeals have repeatedly addressed this issue; the federal district courts have published numerous opinions on the issue; and, this Court has ruled, that such claims were not within federal question subject matter jurisdiction in *Great West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002). Notwithstanding being repeatedly rebuked, plan administrators continue to file suits in the federal district courts, and/or remove state court personal injury claims to federal court seeking to intercept the proceeds of personal injury lawsuits, and force repayment, often without sharing in the costs and fees associated with the recovery of that money. To date, this Court and the United States Courts of Appeals have steadfastly prohibited these claims for reimbursement from being litigated in the federal courts. The decision below, however, ignores the precedent established by this Court in *Knudson*, and followed by the other circuits, and instead, determined that in cases where the

money recovered by a personal injury plaintiff is segregated and identifiable, a plan may rightly bring a claim to impose a constructive trust, pursuant to the "other equitable relief" provision of § 502(a)(3).

Since personal injury claims are required by ethical constraints to be paid from plaintiffs' attorneys "client trust fund account,"[4] most, if not all such payments, are segregated and identifiable. In so deciding, the panel below not only breaks with binding precedent and creates conflict among the circuits, it also opens the doors to the federal court houses throughout the country, where the district judges will be called upon to act as the final arbiter in virtually all personal injury claims in which an ERISA plan made payments and now seeks reimbursement.

This, of course, is no small increase in the number of claims which now may be filed in or removed to the federal courts. In Cook County, Illinois alone, in 2001, there were over 607,000 pending lawsuits, a significant percentage of which involved claims of personal injury. (Annual report of Illinois courts, 2001). Over 150,000,000 Americans are participants of qualified ERISA plans, (www.dol.gov/ebsa/publications/apar_fy2002.html, maintained and published by the U.S. Department of Labor Employee Benefits Security Administration), and thus are provided medical benefits similar to those benefits paid on behalf of the petitioner in this case. Thus, it is fair to conclude that a substantial percentage of plaintiffs in lawsuits currently pending in Cook County alone, not to mention the nation as a whole, were filed by plaintiffs whose medical bills

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[4] *See*, ABA Model Code of Professional Responsibility, DR 9-102 (1980).

were paid in whole or in part by their qualified ERISA plan. As a result of the decision below, all ERISA plans may now rightly file suit in the federal district court to enforce its right to reimbursement, rather than litigate in the state courts, with all other lien holders, and abide by the orders of the state court judge. This decision greatly expands federal question subject matter jurisdiction, and will lead to a flood of federal litigation never contemplated or condoned by this Court's previous decisions.

There is a critical need for direction from this Court, as evidenced by continued litigation on an issue which this Court has only recently attempted to resolve. In light of apparent confusion as to the meaning and intent of this Court's most recent decision on this issue, as well as irreconcilable conflicts in decisions between the Seventh and Ninth, and other circuits, this petition should be granted, and the decision below, be reviewed.

I. The Decision of the Seventh Circuit Court of Appeals Conflicts with this Court's Recent Decision in *Great-West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204 (2002).

The decision below ignores the precedent set by this Court in *Great West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204 (2002). In that remarkably similar case, the Court addressed whether the federal courts could properly exercise subject matter jurisdiction over an ERISA plan's claim for reimbursement against a plan participant for monies paid by the plan and subsequently recovered by the participant as damages in a personal injury lawsuit. The Court specifically found that § 502(a) (3) of the Employment Security Act of 1974, 29 U.S.C. § 1132(a)(3)(1994 ed.) did

not authorize the federal courts to preside over an ERISA plan's claim for reimbursement. This Court was unpersuaded by the plan's attempt to convert a contractual claim for money damages into a claim for equitable relief, such as, injunctive, trust or restitution. *Knudson,* 534 U.S. at 210-219. The majority in *Knudson* specifically determined that the ERISA plan sought to "impose personal liability on respondents for a contractual obligation to pay money," noting that such relief was typically not available in equity. *Id.* at 210; quoting the Seventh Circuit's opinion in *Wal-Mart Stores, Inc. v. Wells,* 213 F3d 398, 401 (7th Cir. 2000). The majority further noted that "almost invariably...suits seeking (whether by judgment, injunction or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for "money damages" as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Knudson* 534 U.S. at 210. The Court also dismissed as unpersuasive, the petitioner's *amicus'* argument that a trust could be imposed as an equitable remedy under § 502(a)(3). *Id.* at 219. Ultimately, this Court finally and succinctly held that "[b]ecause petitioners are seeking legal relief – the imposition of personal liability on respondents for a contractual obligation to pay money – § 502(a)(3) does not authorize this action." *Id.* at 221.

Knudson, characterized the plan's attempt to label its claim for reimbursement as "equitable" as a "struggle" which the Court found unpersuasive. Likewise, in the instant case, the Committee's complaint is nothing more than a claim for money damages as a result of a claimed breach of a contractual duty to pay money. The complaint's factual

allegations allege nothing more against Petitioner[5] than that she was a participant in the Plan; that the plan paid monies on her behalf after she was injured in a motor vehicle accident; that subsequent to the accident she recovered monies from the tortfeasor; and, finally, that the plan has a contractual right to be reimbursed the full amount it paid as a result of the tortfeasor's negligence.[6] Based on those facts, the plan sought relief against Varco in two counts. Count I sought an injunction, Count II sought an injunction, or declaratory judgment specifically enforcing the contractual language of the plan, thus ordering petitioner to pay $34,035.55. Based on those facts, and legal theories, the plan sought in its prayer for relief, "an order granting a declaratory judgment, injunction, specific performance, constructive trust, and restitution against Varco, requiring Defendant Varco to turn over $34,035.55, including appropriate pre-judgment and post-judgment interest..."

In the present matter the analysis is virtually identical to that employed by this Court in *Knudson*. As this Court noted in *Knudson*, the relief sought by the ERISA plan's fiduciary was nothing "but a freestanding claim for money damages," and thus not within the subject matter jurisdiction created by § 502(a)(3). *Knudson*, 534 U.S. at 218. In the present case, the panel ignored that decision, and instead allowed Wal-Mart

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[5] The First Amended Complaint also alleged facts and claims in Counts III and IV against petitioner's attorney. Those claims have been dismissed, and the facts appear to have no bearing on the claims against petitioner now under consideration. (App. D at 31a).

[6] From the start petitioner has admitted the plan was entitled to reimbursement, but has sought reduction pursuant to the Illinois Common Fund Doctrine. (*See* Appendix, H, Varco's original petition to adjudicate.)

to transform a breach of contract action for money damages into an equitable claim to impose a constructive trust.[7] In so doing, the panel allowed Wal-Mart to distort the reality that it "wants the money, and claims that under the plan [the defendant] owes the money to it." *Primax Recoveries Inc. v. Sevilla*, 324 F.3d 544 547-548 (7th Cir. 2003). Further, the panel ignored the reality and the law that such a claim, "is a claim of breach of contract which is a classic legal claim.... Such games with form should be discouraged." *Id.* at 548. Notwithstanding the stern language of Justice Posner's opinion in *Primax*, and the clear intent of this Court to prevent plan administrator's from distorting purely legal remedies for money judgments into various forms of equitable relief, in *Knudson,* the Court below allowed the plan to fabricate a claim for equitable relief, out of a garden variety breach of contract claim. In doing so, the panel ignored the binding precedent this Court established little more than one year ago in *Knudson*. Because all monies distributed to personal injury plaintiffs pass through the client trust fund account of their attorneys, in each case the monies are, identifiable and

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[7] The panel below did so on the basis that Ms. Varco obtained and took possession of money which "in good conscience" belong to the Committee. *See* Appendix B at 9-10. This factual determination, however, ignores that the money was recovered by Ms. Varco for injuries she sustained in a motor vehicle accident. The money rightly belonged to her, notwithstanding her contractual obligations to reimburse the plan for the money it paid for some of her medical treatment resulting from the motor vehicle accident. The Plan cannot claim, and the panel did not find that the Plan paid monies on Ms. Varco's behalf, that it should not have paid, or that Ms. Varco, utilized fraud, duress, or some other culpable behavior to secure the personal injury settlement proceeds. The settlement proceeds are rightly the property of Mrs. Varco, notwithstanding what debt she may owe to the plan. *See*, *Westaff Inc. v. Arce*, 298 F.3d 1164, 1166-1167 (9th Cir. 2002)

segregated, such that, according to the panel's interpretation of *Knudson*, a claim for equitable restitution, and the imposition of a constructive trust would always lie, and thus the federal courts would have federal question subject matter jurisdiction over virtually all personal injury settlements throughout the country. This was not the expressed intent of this Court in *Knudson*. To avoid further confusion, and a flood of litigation relating to distribution of personal injury recoveries, the decision below merits review.

II. The Decision Below Conflicts with Decisions of the Other Federal Circuit Courts of Appeals.

The decision below creates an unquestionable and irreconcilable conflict between the Federal Circuits. For example, in *Westaff Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), cert denied, 537 U.S. 1111 (2003), the Ninth Circuit confirmed its previous holdings, that an ERISA plan's suit for reimbursement, regardless of the label attached to it, is nothing more than an action for compensatory damages. *Id.*, at 1166. In *Westaff*, the defendant, plan participant, received $15,000.00 to settle a claim against a third party responsible for her injuries. Subsequent to that payment, Westaff, the plan administrator and the defendant disputed the amount due to be reimbursed the plan, and Arce's attorney agreed to put the proceeds of the check into an escrow account pending a determination how much was owed and to whom. Thereafter, Westaff filed suit in Federal Court seeking a declaration that the funds in escrow belonged to it, and an order requiring the funds held in escrow be paid to the plan. In affirming the dismissal of Westaff's suit, and affirming an award of attorneys fees to Arce, the Ninth Circuit specifically recognized this Court's decisions in *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 122

(2002), as the controlling authority on this matter:

> Westaff attempts to characterize this claim as one for equitable relief, labeling it a declaratory judgment action, or action for specific performance. In determining whether an action for equitable relief is properly brought under ERISA we look to the "substance of the remedy sought... rather than the label placed on the remedy. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (9th Cir. 1993)(*citing Mertens v. Hewitt Associates*, 508 U.S. 248, 255, 124 L.Ed.2d 161, 113 S.Ct. 2063 (1993)). Westaff is seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim. "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages - monetary relief for all losses their plan sustained as a result of the alleged breach" of the reimbursement provisions. *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997) (*quoting Mertens,* 508 U.S. at 255). The Supreme Court has recently affirmed our approach in *Great West Life*, in which the court analyzed a similar action to enforce a reimbursement clause by looking past the parties' chosen labels to the substance of relief sought:
>
> > The basis for petitioners' claim is ... that petitioners are contractually entitled to some funds for benefits that they conferred. The kind of restitution that petitioners seek therefore is not equitable - the imposition of a constructive trust or

> equitable lien on particular property - but legal - the imposition of personal liability for the benefits that they conferred upon respondents.
>
> *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 715, 115 L.Ed.2d 635 (2002).
>
> This case differs from our prior cases only in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been placed in an escrow account and remains specifically identifiable. The action remains one for money damages. The district court correctly recognized this and dismissed the case for failure to state a claim.

Westaff, 298 F.3d at 1166, 1167.

The decision in *Westaff* is entirely irreconcilable with the decision of the panel below. The facts are identical. Based on identical facts, the Ninth and Seventh Circuits have now come to decisions which are diametrically opposed, and create confusion and uncertainty on this Court's holding and intent in *Great West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002).

In both cases plaintiff sought to collect part of the proceeds of the plan participant's personal injury recovery as reimbursement pursuant to the terms of the plan. In both cases plaintiff couched its claim in terms of equitable relief in an effort to obtain control of the segregated funds. And in both cases, there was a segregated account against which the plan sought its "equitable" claim. But while the Ninth Circuit

found that the claim was one for money damages, rather than a claim for equitable relief, and thus not properly within the subject matter jurisdiction of the Federal Courts, the panel below, under identical circumstances, came to an opposite conclusion. This split causes confusion, and sets precedent for diverse results under similar circumstances, and warrants review by this court. It is appropriate and necessary for this court to grant certiorari to resolve such clear conflicts between the Circuits. *See*, *Boeing Co. v. United States*, 537 U.S. 437, 445 (2003).

Likewise, other circuits have adhered to this Court's admonition to look past the label attached to a suit filed under § 502(a)(3), and instead determine whether the claimant is seeking to impose personal liability for traditionally legal remedies. *See*, *Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-322 (2nd Cir. 2003); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 457 (3rd Cir. 2003); *Local 109 Ret. Fund v. First Union National Bank*, 57 Fed. Appx. 139, 140-141 (4th Cir. 2003); *Bauhaus USA Inc. v. Copeland,* 292 F.3d 439, 445 (5th Cir. 2002); *Cmty. Ins. Co. v. Morgan*, 54 Fed. Appx. 828, 831 (6th Cir. 2002), (Specifically holding that a claim for reimbursement pursuant to the contractual language of the plan is nothing more than a claim to impose personal liability for a contractual obligation to pay money.); *Unicare Life & Health Ins. Co. v. Saiter*, 37 Fed. Appx. 171, 173 (6th Cir. 2002). The decision below is an aberration, conflicts with precedent set by this Court, and conflicts with decisions of other circuits, and should be reviewed by this Court to ensure uniform enforcement of federal law.

III. The Decision of the Panel Conflicts with Other Decisions Within the Seventh Circuit.

Not only does the panel's decision conflict with prior decisions of this Court, and other federal circuit courts of appeal, the decision below also creates an intra circuit conflict. In *Primax Recoveries Inc. v. Sevilla*, 324 F.3d 544 (7th Cir. 2003), the Seventh Circuit considered another similar action initiated by Primax Recoveries, an authorized ERISA fiduciary, to recover medical benefits after its employee secured a personal injury settlement. After detailing a tortured procedural history, and recognizing the jurisdictional requirement that the ERISA fiduciary's claim seek equitable, rather than legal relief, the Court in *Sevilla*, evaluated the nature of the relief sought:

> Setting to one side the release, let us consider whether Primax's claim to be entitled to the entirety of the $2,431.78, with no reduction based on the common fund doctrine, is an equitable claim. It is not. Primax wants (remember we're ignoring the release for the moment) $2,431.78 from Sevilla. It is true that Primax is holding on to the check from the third party's insurer, but the check is worthless without the endorsement of Sevilla's lawyer (presumably he can endorse his client's signature as well as his own, though that is another detail we will elide), and while one could imagine construing Primax's suit as a suit for an injunction commanding the lawyer to do that, this would distort the reality of the claim. Primax doesn't want the check as such; it wants the money, and it claims that under the plan Sevilla owes the money to it. That is a claim of breach of

> contract, which is a classic legal claim. Almost any legal claim can be given the form of an equitable claim (that is a claim seeking an order to do or not do something), but such games with form should be discouraged. [*Great-West v.Knudson*, 534 U.S.] at 211 n.1 122 S.Ct. 708; *Wal-Mart Stores, Inc. v. Wells, supra,* 213 F. 3d at 401.

Sevilla, 324 F.3d at 547-548. Here, consistent with *Knudson*, and the decisions of the other federal circuit courts of appeals, most notably, the Ninth Circuit, Justice Posner, in *Sevilla*, made it clear that the Court would not permit semantic gamesmanship to manipulate federal subject matter jurisdiction. Simply put, the Court in *Sevilla*, determined that an ERISA fiduciary's claim for reimbursement under the terms of the plan, no matter how drafted, is a legal claim for breach of contract, and thus not within the federal subject matter jurisdiction granted under 29 U.S.C. § 502(a)(3)(2002). In the decision below, the panel ignored this precedent, the precedent set by this Court, and other Federal Circuits, and had become the first and only panel of the federal circuit courts of appeal to find federal subject matter jurisdiction for an ERISA plan administrator's claim for reimbursement against a plan participant's personal injury recovery. The decision cannot in good conscience be reconciled, and in fact opens the flood gates for the Federal District Courts to become the final arbiters over the distribution of recovery in hundreds of thousands of personal injury claims nationwide. As a result of the panel's refusal to accept the precedent set by this Court, and the decisions of the other circuits, and even within its own circuit, the decision below warrants, in fact demands review.

IV. The Issue Here Presented Is of Substantial Importance.

Whether the Federal Courts should act as the final arbiter of distribution of settlement proceeds of the vast majority of personal injury claims pending in state courts, is a question of substantial importance. As set forth above, this Court, and various other circuits, and in fact other panels of the Seventh Circuit have repeatedly determined that the federal court lacks the required subject matter jurisdiction to preside over an ERISA plan's claim for reimbursement against a plan participant who has made a personal injury recovery. The panel below, however, has ignored this precedent, and carved an exception which emasculates the rule. As a result, not only is the scope and breadth ERISA's subject matter jurisdiction dramatically increased by the decision below, but left intact, the panels' decision will result in the filing of potentially hundreds of thousands of lawsuits, brought by plan administrators, seeking orders to avoid the legal remedies available to them in state courts, and instead, seeking what they call an "equitable remedy" which amounts to nothing more than a money judgment.

The impact is substantial, particularly in light of the current dockets before most Federal District judges, and the ever growing number of unfilled vacancies within the federal judiciary. This Court, and the other circuits to consider this issue, have steadfastly refused to expand the subject matter jurisdiction of ERISA to include such claims for reimbursement. Given the obvious conflict between the Seventh and Ninth Circuits, and the panel's departure from this Court's recent decisions in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 202 (2002), combined with impact of the potential significant increase the number of suits

filed in the federal courts, there is an urgent need for this Court to intervene.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case Nos. 02-3879, 02-1124, & 02-1143
[Decided August 22, 2003]

Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan, Plaintiff-Appellant/Cross-Appellee,	)
v.	)
Clara Varco, Defendant-Appellee/Cross-Appellant.	)

JUDGES: Before Hon. Joel M. Flaum, Chief Judge, Hon. William J. Bauer, Circuit Judge, Hon. Daniel A. Manion, Circuit Judge.

ORDER

On consideration of the petition for rehearing en banc filed by defendant-appellee, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case Nos. 02-3879, 02-1124 & 02-1143
[Decided July 29. 2003]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN, Plaintiff-Appellant/Cross-Appellee,	)
v.	)
CLARA VARCO, Defendant-Appellee/Cross-Appellant.	)

JUDGES: Before FLAUM, Chief Judge, and BAUER and MANION, Circuit Judges.

OPINION: MANION, Circuit Judge.

I.

Clara Varco, a Wal-Mart employee, incurred medical expenses due to a car accident, which were paid by Wal-Mart's health and welfare benefit plan. After Varco recovered damages for her injuries in a state court action, the Wal-Mart Plan Committee sought restitution for the medical expenses it

had paid from Varco and her attorney, Laurence Dunford. The district court granted a preliminary injunction in favor of the Committee, preventing Varco and her attorney from disbursing those funds or further adjudicating the matter in state court. Varco and Dunford appealed the preliminary injunction. The district court then granted summary judgment in favor of the Committee, ordering that the medical expenses be remitted to the Committee, less its proportional share of Dunford's attorney's fees pursuant to Illinois' common fund doctrine. The Committee appealed the order diminishing its reimbursement due to the application of the common fund doctrine. The cases were consolidated. We affirm in part and reverse in part.

II.

On September 24, 2000, Clara Varco sustained injuries in an automobile collision in Orland Park, Illinois. At that time she was employed by Wal-Mart Stores, Inc. ("Wal-Mart"), which provides its employees benefits through the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan"). The Plan is a self-funded employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 and administrated by the Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Committee"). Pursuant to the terms of the Plan,$18,865.72 in medical benefits was immediately paid on behalf of Varco following the accident.

Significantly, for the purposes of appeal, the Plan includes a provision stating that the Committee has a right to "recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of . . . any judgment, settlement or any payment made or to

be made, relating to the accident, including but not limited to other insurance." The Plan further provides that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant."

The procedural intricacies of this case began when Varco retained Laurence J. Dunford to represent her against Kristopher Lapsis, the other driver responsible for her injuries, and to make a claim against All-State Insurance Company, her insurer. She contracted with Dunford to pay him a contingency fee of one-third of any recovery. Varco then filed a tort action in Illinois state court against Lapsis. In October 2001, in contemplation of settlement, Varco sought adjudication of various liens on the lawsuit, including that of the Plan. In response, the Committee asked the state court to postpone adjudication of its lien and filed a notice for removal in federal court. The district court promptly remanded the case back to state court finding no subject matter jurisdiction. *Varco v. Lapsis,* 172 F.Supp.2d 985, 988-92 (N.D. Ill. 2001).[1] Not content with this course of events, the Committee filed a second action in federal court on October 29, 2001, asserting claims under § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief" including an injunction, declaration of rights, specific performance, imposition of a constructive trust and restitution against Varco and Dunford. The Committee also moved to have related matters in state court stayed and Varco and Dunford enjoined from proceeding with further state court litigation.

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[1] In remanding the case, Judge Alesia presciently noted that "there may be federal jurisdiction over the Wal-Mart Committee's independent action if the complaint states a claim under ERISA's civil enforcement provision, § 502(a)(3)." *Lapsis,* 172 F. Supp. 2d at 991 n.7.

While these suits were proceeding, Varco, through her attorney, received settlement proceeds of $100,000. The settlement proceeds were disbursed by Dunford to Varco, himself, and other lienholders. In anticipation of litigation, Varco established a reserve bank account in her name in the amount of $34,034.55 (the initial amount the parties believed to have been spent in medical bills under the Plan) to pay the Committee when the courts resolved the question of what amount was due and owing. Dunford, meanwhile, took his full portion of attorney's fees from the settlement fund ($22,000) when he disbursed the monies, thereby leaving all of the disputed monies in Varco's possession. *Administrative Committee of Wal-Mart Stores, Inc. v. Varco,* 2002 U.S. Dist. LEXIS 18933, No. 01 C 8277, 2002 WL 31189717 *2, n. 5 (N.D. Ill., Oct.02, 2002) ("Varco III"). At the end of December 2001, Dunford and Varco returned to state court and filed a motion to adjudicate Wal-Mart's lien. In response, the Committee filed yet another motion in federal court pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, the All Writs Act, 28 U.S.C. § 1651, and "the Princess Lida doctrine" to enjoin the state court from adjudicating the liens.

The Committee was successful in both of its motions before the district court. On December 24, 2001, it obtained a temporary restraining order from the district court and a preliminary injunction preventing Varco and Dunford from disbursing the $34,035.55 until "the rights of [the Committee] have been determined by [the district court]." *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco,* 2001 U.S. Dist. LEXIS 25319, No. 1:01-CV-8277, 2001 WL 1772318, *3 (N.D. Ill., Dec. 21,

2001) ("Varco I").[2] On January 14, 2001, the court entered an injunction barring Varco from proceeding with further adjudication of the Committee's lien in state court. *Administrative Committee v. Varco & Dunford,* 2002 U.S. Dist. LEXIS 530, No. 01 C 8277, 2002 WL 47159, *3-4 (N.D. Ill. Jan. 14, 2002) ("Varco II").The court also dismissed all of the Committee's claims for equitable relief with the exception of its "claim for the imposition of constructive trust on particular property in the hands of the defendants and for the pendent state law claims." 2002 U.S. Dist. LEXIS 530, [WL] at *4. After the district court stayed the state court proceedings and enjoined Dunford and Varco from proceeding in state court, the Committee removed for the second time Varco's personal injury action, as all of the liens on the settlement, except for the Committee's, had been paid. The district court found that it properly had jurisdiction to adjudicate the Committee's claim this time, for reimbursement as "equitable relief" under § 502(a)(3)(B),because the Committee was seeking a constructive trust over Varco's reserve account. Varco and Dunford then filed a timely interlocutory appeal of the injunctions arguing, in relevant part, that the district court lacked jurisdiction over the claims because the Committee was seeking legal relief based on the language of the Plan.

While the injunction was pending on appeal, the district court proceeded to address the merits of the case. On October 2, 2002 the district court granted the Committee's motion for summary judgment, holding that the Plan was due

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[2] During the course of the litigation, the parties discovered that Blue Cross/Blue Shield of Illinois, the Plan's third-party administrator, was able to obtain discounts on Varco's medical expenses. As a result, the court granted Varco's motion to amend the preliminary injunction by reducing the amount subject to it to $18,865.72.

reimbursement of the paid medical expenses. *Varco III* 2002 U.S. Dist. LEXIS 18933, [WL] at *4-6. The court also held that, pursuant to Illinois' common fund doctrine, the Committee must bear its proportional share of Dunford's attorney fee. Based on this doctrine, the court determined that the Committee was entitled to restitution of the paid medical expenses,$18,865.72, less its proportional share of Dunford's legal expenses for a total of $12,378.04. In rendering this decision, the district court issued an order noting that by adjudicating the merits of the claim, the preliminary injunctions entered in the case expired by their own terms.[3] As Varco notes, the district court's order on October 29, 2002, effectively mooted the cross-appeals filed by Varco and Dunford insofar as the appeals contested the merits underlying the preliminary injunctions.[4] However, Varco's challenge to

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[3] The first injunction, which required Varco to hold the disputed funds, expired when "the trial court decided the rights of the parties with reference to the funds claimed by the [Committee]." *Varco I* 2001 U.S. Dist. LEXIS 25319, [WL] at *4. The second injunction, which prevented further litigation in state court, expired when all of the remaining actions in the case were removed and then resolved by the district court.

[4] The district court also noted that Wal-Mart's claims against Dunford were voluntarily dismissed pursuant to F.R.C.P. 41(a)(2).The court then dismissed Dunford's counterclaim against Wal-Mart for attorney's fees, and dismissed Dunford as a defendant in the case, as he had received full compensation for his services and all of the disputed funds were in the possession of Varco. Because the issues involving Dunford were mooted by the district court's order disbursing the attorney's fees, he was not included with Varco as an appellant by Wal-Mart. Dunford did not file his own appeal from the court's decision on the merits of the action and thus he has nothing further left at stake in the present appeal. We therefore order Dunford's appeal (02-1143) dismissed as moot.

the district court's jurisdiction to hear the case remains. The Committee then filed a timely appeal from the district court's order on the merits arguing that the common fund doctrine is preempted by ERISA. We consolidated these cases on appeal. Because of the district court's grant of summary judgment, and dismissal of Dunford as a litigant, the only remaining issues that survive on appeal are whether the district court had subject matter jurisdiction over the Committee's claims and, if so, whether the Committee must reimburse Varco for her payments to her attorney pursuant to Illinois common fund doctrine.

III.

On appeal, Varco asserts that the district court erred in finding subject matter jurisdiction to hear the case under 28 U.S.C. § 1331. Varco argues that the district court lacked subject matter jurisdiction because the Committee's claim was for money due and owing under contract, which is essentially a legal remedy, and ERISA creates jurisdiction in federal court only for "other appropriate equitable relief" under § 502(a)(3)(B). Varco argues that the creation of a constructive trust over the disputed funds falls outside of this jurisdictional grant.

A. Subject Matter Jurisdiction

Under 28 U.S.C. § 1331, federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." A case arises under the laws of the United States within the meaning of § 1331 only when the claim for relief depends in some way on federal law as stated in a well pleaded complaint, "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson,* 234 U.S. 74,

75-76, 58 L. Ed. 1218, 34 S. Ct. 724 (1914); *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 401 (7th Cir. 2001). ERISA § 502(a)(3) authorizes a civil action "by a ... fiduciary (A) to enjoin any act or practice which violates ... the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of ... the terms of the plan." 29 U.S.C. § 1132(a)(3). In this case the district court held, relying on the Supreme Court's reasoning *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), that the Committee was seeking equitable relief as required by ERISA in the form of a constructive trust over the funds held in Varco's reserve account, and, therefore, it had jurisdiction to adjudicate the merits of the Committee's claim. *Varco II,* 2002 U.S. Dist. LEXIS 530, [WL] at *2-3.

In *Great-West Life*, the Court considered a case with facts similar to this case and therefore bears scrutiny. Janette Knudson, a beneficiary of an ERISA-governed employee welfare benefit plan, was injured in a car accident. *Great-West Life,* 534 U.S. at 207. The employee benefit plan included a reimbursement provision that provided the plan with "the right to recover from the [beneficiary] any payment for benefits paid by the Plan that the beneficiary is entitled to recover from a third party." *Id.* In particular, the Great-West plan had "'a first lien upon any recovery, whether by settlement, judgment or otherwise,' that the beneficiary receives from the third party, not to exceed 'the amount of benefits paid [by the Plan] ... [or] the amount received by the [beneficiary] for such medical treatment ...'" *Id.* According to this provision, the Great-West plan covered $411,157.11 of Knudson's medical expenses, of which all except $75,000 was paid by Great-West. *Id.* Great-West then sought to obtain restitution of the medical expenses it had paid on Knudson's

behalf out of her damages recovery. *Id.* at 208. The Court looked at the substance of plaintiff's complaint to determine whether it fell into "those categories of relief that were typically available in equity." *Great-West Life,* 534 U.S. at 210 (quoting *Mertens v. Hewitt Associates,* 508 U.S. 248, 256, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993)). Restitution, the court noted, is "'not an exclusively equitable remedy,'and whether it is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)(B)) remains dependent on the nature of the relief sought." *Id.* at 215 (citing *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)). The Court contrasted legal restitution, which is not allowed under § 502(a)(3)(B), from equitable restitution holding:

> [A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. (citations omitted) A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property[sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's]claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." . . .Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. at 213-14.(internal citations omitted)

In *Great-West Life*, the Court then noted that the proceeds of the settlement to which Great-West maintained it was entitled were not in the Knudson's possession, but instead were in a Special Needs Trust. *Id.* at 214. Therefore, under the *Mertens* standard, the Court concluded that Great-West was not seeking equitable relief under § 502(a)(3)(B), because it was not claiming "particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred." *Id.*

Against this backdrop, we proceed to the Committee's claim against Varco. The Committee, as a fiduciary, was seeking to impose a constructive trust on the funds held in Varco's reserve bank account. Unlike the legal action addressed in *Great-West Life*, the funds at issue here are identifiable, have not been dissipated, and are still in the control of a Plan participant due to the fact that Dunford placed them in a reserve account in Varco's name when they were disbursed. Finally those funds, "in good conscience," belong to the Committee. The Plan clearly states that Varco's rights to recover benefits may be subrogated when there is a settlement and that "the Plan has first priority with respect to its right to reduction, reimbursement and subrogation." Under similar facts, we have held that a suit to impose a constructive trust "nestles comfortably" within ERISA's concept of equity. *Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells,* 213 F.3d 398, 401 (7th Cir. 2000); *see also* 1 Dan B. Dobbs, *Dobbs on the Law of Remedies: Damages-Equity-Restitution* § 4.3 pp.591 (2d ed. 1993) ("[The asset subject to a constructive trust] may even be a fund of money like a bank account.").

In response, Varco argues that this is essentially a legal claim asserted by the Committee in order to enforce its contract rights under the Plan because "a claim for money due and owing under a contract is 'quintessentially an action at law.'" *Wells,* 213 F.3d at 401 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 459, 51 L. Ed. 2d 464, 97 S. Ct. 1261 (1977)). Varco would have a valid argument under traditional principles of equity if an identifiable *res* did not exist to which the Committee could claim a legally recognized right. *See generally* Dobbs § 4.3(2) at 591. Similarly, an argument would exist if the Committee could not trace its property to a specific fund of money. *Id.* at 592. Neither of those situations, however, is presented here. Thus, under *Great-West Life*, the reimbursement action by the Committee in this unique case is equitable because the funds the Committee seeks to recover are identifiable, are in the control of a defendant, and the Committee is rightfully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA, and the district court properly exercised federal question subject matter jurisdiction under 28 U.S.C. § 1331.

B. Common Fund Doctrine

We turn next to the question of whether the district court properly applied Illinois' common fund doctrine to the settlement proceeds. Under the common fund doctrine, a lawyer who recovers a sum of money (or "fund") for the benefit of others beyond his client is entitled to reasonable attorney's fees from the fund as a whole. *See Country Mutual Insurance Co. v. Birner,* 293 Ill. App. 3d 452, 688 N.E.2d 859, 861-62, 228 Ill. Dec. 161 (Ill.1997). It is a common law "equitable exception" to the general, or "American" rule, that

each party to litigation bears its own attorney's fees, absent a fee-shifting statute. *See Scholtens v. Schneider,* 173 Ill. 2d 375, 671 N.E.2d 657, 662, 219 Ill. Dec. 490 (Ill. 1996).To be entitled to fees under the common fund doctrine, an attorney must show "(1) that the fund was created as a result of legal services he performed; (2) that the subrogee did not participate in creating the fund; and (3) that the subrogee benefitted out of the fund." *Birner,* 688 N.E.2d at 862. When these conditions are satisfied, fees and expenses incurred in setting up the fund are typically apportioned among those who benefitted from its creation. *Id.* And, finally, "in Illinois, the attorney owns the claim for reimbursement for his services in creating a common fund." *Primax v. Sevilla,* 324 F.3d 544, 549 (7th. Cir. 2002) (*citing Bishop v. Burgard,* 198 Ill. 2d 495, 764 N.E.2d 24, 30-32, 261 Ill. Dec. 733 (Ill. 2002)).

The district court held that even though the Plan specifically provided that the plan participant was responsible for all attorney's fees, the common fund doctrine would still apply, and that in this case the Committee was responsible for one-third of Dunford's fees. The court reasoned that the Plan language would only apply if the Illinois doctrine conflicted with and was preempted by § 514(a) of ERISA (29 U.S.C. § 1144(a)).[5] Varco II, 2002 U.S. Dist. LEXIS 530, [WL] at

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[5] ERISA provides two types of preemption: complete preemption under § 502(e) and conflict preemption under § 514. *See Rice v. Panchal,* 65 F.3d 637, 640 (7th Cir. 1995). Section 502(e), by providing a civil enforcement cause of action, completely preempts any state cause of action seeking the same relief. *Id.* We have held that the common fund doctrine is not preempted under § 502(e). *Speciale v. Seybold,* 147 F.3d 612, 617 (7th Cir. 1998). *See also Primax* 324 F.3d at 549 (stating that in the complete preemption context ". . . we have held that ERISA does *not* preempt common fund claims"). Section 514, in contrast, provides for ordinary

*4. The district court then held, and Varco argues here, that ERISA does not preempt the common fund doctrine pursuant to the law as interpreted by the Illinois Supreme Court. 2002 U.S. Dist. LEXIS 530, [WL] at *5 (citing *Bishop,* 764 N.E.2d at 34). In *Bishop*, the Illinois Supreme Court held that despite an ERISA plan's contractual language requiring 100% reimbursement, the common fund doctrine requires the plan to bear its proportionate share of the participant's attorney's fee.[6] The district court, and Varco, also rely on *Blackburn v. Sundstrand Corp.,* 115 F.3d 493, 496 (7th Cir. 1997). There we held that the Illinois common fund doctrine was not preempted by ERISA to the extent that it allowed ERISA plan beneficiaries to reduce their obligation to repay medical expenses by one third pursuant to a subrogation provision based on beneficiaries' payment of attorney's fees. *Id.*; *accord Primax* at 549; *Wells,* 213 F.3d at 403. The plan at issue in *Blackburn* did not expressly require beneficiaries to pay their own attorney's fees. In this case, the Plan

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conflict preemption dependent on the relationship between the law in question and the language of the plan. Section 514(a) specifically provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).

[6] The court put a special emphasis on the holding in *Bishop* noting that, "it would be anomalous, however, for this court in this rare case in federal court to adhere to the view that the common fund doctrine does not apply where the 'run of the mine' case of this sort will be decided in the Illinois courts and governed by *Bishop*. If *Bishop* was wrongly decided, only the United States Supreme Court or the legislature can overrule it." *Varco III 2002 U.S. Dist. LEXIS 18933, [WL] at *6.* However, while this case may be the rare case that finds jurisdiction in federal court under this cause of action, that does not mean we should defer to a state court determination of federal law unless that determination is also correct.

specifically provides that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant."

We have as yet not had the opportunity to rule, either as a matter of state or federal common law, that the common fund doctrine defeats the terms of an ERISA plan that expressly requires participants to pay their own legal fees. *See Blackburn,* 115 F.3d at 496. In *Blackburn*, we found that although the common fund doctrine applied where the plan did not specifically require the participant to bear her own attorney's fees, we commented that "a plan might have a better argument if its governing documents expressly required participants to pay their own legal fees . . . and to remit the gross rather than the net proceeds from litigation." We cautioned that such a provision would likely give the injured person "every reason to disclaim any demand for medical expenses in tort suits, throwing on plans the burden and expense of collection," if not someone else. *Id.* at 496. Furthermore, we have stated that "because ERISA supersedes any and all state laws relating to covered plans, . . . [the Illinois common fund] doctrine is not available to [the beneficiary] [where] the terms of the plan require reimbursement of the entire amount without the deduction of any attorney's fees." *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund,* 25 F.3d 509, 510 (7th Cir.1994). This dicta in *Land* did not settle the matter as recognized in *Blackburn,* wherein we specifically noted that "the status of the state's common fund doctrine is a recurring question that should be clarified. . . ." *Blackburn,* 115 F.3d at 495. This case presents the opportunity to answer that question in determining whether the Illinois common fund doctrine relates to and conflicts with the terms of the Plan.

"[A] state law relates to an ERISA plan 'if it has a connection with or reference to such a plan.'" *Egelhoff v. Egelhoff,* 532 U.S. 141, 147, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983)). The requisite connection exists under *514(a)* if a law mandates employee benefit structures or their administration or provides alternative enforcement mechanisms to ERISA. *New York Conf. of Blue Cross v. Travelers Ins. Co.,* 514 U.S. 645, 658, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995). In this analysis, a court "looks both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive as well as to the nature of the effect of the state law on ERISA plans." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316, 325, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997) (internal citations and punctuation omitted). In *Egelhoff,* for example, the Court found conflict preemption and noted that the "the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Egelhoff,* 532 U.S. at 150. Justice Scalia, in his concurrence, notes that while he remained unsure "as to what else triggers the 'relate to' provision", the "pre-emptive provision of the *Employee Retirement Income Security Act of 1974* (ERISA) is assuredly triggered by a state law that contradicts ERISA." *Id.* at 152 (J. Scalia, concurring).

In this case, much like *Egelhoff,* state law contradicts the terms of the Plan and therefore contravenes ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents. *See also Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003). Varco seeks to invoke a state law doctrine to her advantage in determining her recovery as a beneficiary under an ERISA-regulated

employee benefits plan. If the Illinois common fund doctrine were applied, the Committee would receive less than total reimbursement of Varco's medical benefits from her settlement through the deduction of her attorney's fees in contravention of the clear mandate of the Plan. Conflict preemption, therefore, is appropriate in this case where "Congress has made its preemption intention clear in the language of the statute, the Supreme Court has affirmed that intent, and we have applied the rule in similar cases." *Melton,* 324 F.3d at 945 (*citing* 29 U.S.C. § 1144(a) and *Egelhoff,* 532 U.S. at 151). Because the Plan controls in this case, the Committee is due the full amount of the medical expenses paid on Varco's behalf, or $18,865.72.

Furthermore, it is not readily apparent that Varco has standing to raise the claim for attorney's fees under the Illinois common fund doctrine. In *Bishop*, the Illinois Supreme Court noted that the right of the common fund doctrine is a "quasi-contractual right to payment of fees for services rendered [and] belongs to the attorney who rendered the services and does not affect the contractual relationship between the plan participant and the plan." *Bishop* at 31 (*citing Scholtens v. Schneider,* 173 Ill. 2d 375, 671 N.E.2d 657, 219 Ill. Dec. 490 (1996)); *Primax,* 324 F.3d at 547. Common fund claims are therefore considered "wholly independent of a benefit plan under Illinois law, and [are] to be brought by a third party, the attorney who represented the participant, to enforce the attorney's quasi-contractual right to payment for services rendered in recovering [for the plan's benefit]." *Hillenbrand v. Meyer Medical Group, S.C.,* 308 Ill. App. 3d 381, 720 N.E.2d 287, 294, 241 Ill. Dec. 832 (1999).For example, in *Bishop*, although the named parties to the action were the plan and the plan participant, the court viewed "the motion for adjudication . . . [as] an independent action by the attorney, which is unrelated to the benefit plan

and does not alter the contractual relationship of the parties thereto." *Id.* at 34. Because of this characterization, the court determined that the parties properly had standing to maintain the cause of action and ruled that neither conflict preemption, under § 514(a), nor complete preemption, under § 502(e), applied to the claim due to the lack of a relationship between the plan and the claimant. Id.

Pursuant to this characterization, Varco would only have standing to bring this claim under Illinois law if this case involves a dispute which can be fairly characterized as an independent action by the attorney to enforce his right to payment for services rendered. As we previously noted, Varco's attorney Dunford has been dismissed from this action and all of the disputed funds remain in Varco's sole possession in a reserve account in her name. The Committee in this case is therefore seeking to assert its rights under the Plan, through an equitable action, to monies held in their entirety by Varco. Dunford has already been completely compensated, and perhaps over-compensated, with other funds derived from the settlement. What Varco is really seeking is reimbursement from the Committee for the fees that she has already paid to Dunford in anticipation of the application of the Illinois common fund doctrine. However, as Illinois courts have held, the common fund doctrine operates independently of a plan document. The relationship between Varco and the Plan is controlled completely by the terms of the Plan, *see Egelhoff,* 532 U.S. at 147-48, and those terms dictate that the Plan is not responsible for attorney's fees. If Dunford had not compensated himself fully, and, as a result, still had a stake in the action based on the outcome of this case, then the district court could have properly categorized the action as one by an attorney to enforce his rights and therefore appropriately brought by Varco under Illinois state law. But because Dunford has no stake in the

outcome of this case, this action by Varco is not for appropriate equitable relief pursuant to the Illinois common fund doctrine.

Our conclusion that the Illinois common fund doctrine conflicts with, and therefore is preempted by, the terms of the Plan in this case does not completely foreclose the possibility of Varco asserting a claim. As Varco argues, the federal common fund doctrine, which is similar to, but not identical in application to the Illinois doctrine, has existed independently in the federal system since 1882. *See Boeing v. Van Gemert, et al.*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). Although primarily used only in situations involving class action law suits, federal courts have interpreted the doctrine to apply in single-party ERISA disputes despite the absence in the suit of the affected attorney. *See McIntosh v. Pacific Holding Co.*, 120 F.3d 911, 912 (8th Cir. 1997); *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141 (8th Cir. 1996). *But see Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 278-79 (1st Cir. 2000).

Courts that have applied the federal common fund doctrine have done so pursuant to the rule that courts may fashion federal common law when "necessary to effectuate the purposes of ERISA." *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992) (citations omitted). However, in reviewing ERISA-related disputes, "resort to federal common law generally is inappropriate when its application would conflict with the statutory provisions of ERISA, discourage employers from implementing plans governed by ERISA, or threaten to override the explicit terms of an established ERISA benefit plan." *Id.* (citations omitted).

As we have often recognized, one of ERISA's primary purposes is to ensure the integrity of written plans. *Duggan v.*

Hobbs, 99 F.3d 307, 309-10 (9th Cir. 1996); *see also Van Orman v. American Ins. Co.,* 680 F.2d 301, 312 (3d Cir.1982) ("The Supreme Court has emphasized the primacy of plan provisions absent a conflict with the statutory policies of ERISA."); *Pohl v. National Benefits Consultants, Inc.,* 956 F.2d 126, 128 (7th Cir. 1992). Thus, we have held that to ensure the integrity of pension and welfare plans courts should confine the benefits to the terms of the plans as written. *Pohl,* 956 F.2d at 128. Therefore, it is inappropriate to fashion a common law rule that would override the express terms of a private plan unless the overridden plan provision conflicts with statutory provisions or other policies underlying ERISA. *Id.*

In this case, applying federal common law to override the Plan's reimbursement provision would contravene, rather than effectuate, the underlying purposes of ERISA because the express terms of the Plan provide for the appropriate distribution of attorney's fees. *See Coleman v. Nationwide Life Ins. Co.,* 969 F.2d 54, 58 (7th Cir. 1992); *Ryan by Capria-Ryan v. Federal Express Corp.,* 78 F.3d 123, 127-28 (3d Cir. 1996) (holding that the federal common fund doctrine may not be applied in contravention of a plan's terms).

Those cases which have applied the federal common fund doctrine in the favor of individual ERISA participants have done so, correctly, only in the absence of controlling plan language. *See McIntosh* at 912; *Waller,* at 141. Accordingly, we conclude that the Plan in this case controls the relationship between Varco and the Committee, and because it does not authorize the payment of her attorney's fees, we do not possess the authority to rewrite the Plan in her benefit.

Finally, Varco argues that by allowing the Committee to recoup its medical payments even though it did not pay for the

legal prosecution of the action, we are essentially awarding them unjust enrichment. However, the unambiguous language of the Plan obligates her to repay the benefits paid in full without a pro rata deduction for her legal expenses, and thus any so-called enrichment is not unjust. *See Ryan,* 78 F.3d at 127 ("Enrichment is not 'unjust' where it is allowed by the express terms of the . . . plan.") (quoting *Cummings by Techmeier v. Briggs & Stratton Retirement Plan,* 797 F.2d 383, 390 (7th Cir. 1986)). This type of plan provision, involving the relinquishment by a plan participant of certain legal rights, has previously been upheld in *Cutting v. Jerome Foods, Inc.,* 993 F.2d 1293, 1297-98 (7th Cir. 1993). In *Cutting*, we explained the trade-off whereby most covered persons-- if given an option-- would readily give up a "common fund-type" reduction in exchange for having their medical expenses paid up-front in third-party liability situations instead of refusing the benefits (and therefore not having to reimburse the plan) and paying their medical expenses out of their settlement. "Assignment, by shifting the insured's tort rights to the insurance company, reduces the price of insurance and thus enables the insured to obtain more coverage, in effect trading an uncertain bundle of tort rights for a larger certain right, which is just the sort of trade that people seek through insurance." *Id.* at 1298. In this case, plan participants have traded the possibility of having the Plan participate in attorney's fees for the guarantee that medical bills will be paid immediately.

IV.

In conclusion, the district court correctly accepted subject matter jurisdiction under 502(a)(3)(B) because the Committee was seeking an equitable remedy to enforce the terms of the Plan. However, the court improperly held that the Illinois common fund doctrine applied in reducing the amount owed

to Committee from $18,865.72 to $12,378.04. The federal common fund doctrine is inapplicable in this case as its application would contravene the plain language of the Plan. This case is AFFIRMED in part, REVERSED in part, and REMANDED to the district court with instructions, to proceed in the manner provided.

APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

Case Number 01-C-8277
[Entered Oct. 29, 2002]

Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan	)
v.	)
Clara Varco, et al.	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff on Count II of its complaint, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan. Within 7 days of entry of this order, defendant Clara Varco is directed to make restitution to plaintiff in the amount of

$12,378.04. The preliminary injunctions entered in this case on December 21, 2001 and on January 10, 2002, having expired by their terms, and all other claims presented by the complaint and counterclaims having been previously dismissed, this case is terminated.

Michael W. Dobbins, Clerk of Court

Date: 10/29/2002

Michael Dooley, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 01-C-8277
[Decided Oct. 2, 2002]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,
Plaintiff and Counter defendant,

vs.

CLARA VARCO,
Defendant,

and

LAURENCE DUNFORD,
Defendant and Counter plaintiff.

JUDGE: JOAN HUMPHREY LEFKOW, United States District Judge.

Plaintiff and counter-defendant, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan ("Wal-Mart"), is a fiduciary and administrator of an employee welfare benefit plan (the "Plan") under the

Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Defendant, Clara Varco ("Varco"), is a participant in the Plan and a party in possession of monies attributable to medical expenses advanced by Wal-Mart under the Plan which were derived from a third party recovery in a state court action. In this case, Wal-Mart seeks restitution in an amount equal to the reimbursement to which it is entitled under the Plan for payment of Varco's medical expenses. Defendant and counter-plaintiff, Laurence J. Dunford ("Dunford"), an attorney who was retained by Varco, seeks in his counterclaim a judgment against Wal-Mart for a portion of his professional fee out of the same monies in Varco's possession from which Wal-Mart seeks reimbursement. For the reasons set forth herein, the court grants Wal-Mart's motion but finds that under the common fund doctrine Wal-Mart must pay its proportional share of Dunford's attorney's fee. Thus, judgment in favor of Wal-Mart shall be reduced from the amount requested.

SUMMARY JUDGMENT STANDARDS

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed R. Civ. P. 56(c) Advisory Committee's notes. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a

genuine issue for trial. *Id.* at 324; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A material fact must be outcome determinative under the governing law. *Insolia*, 216 F.3d at 598-99. Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000), the court must construe all facts in a light most favorable to the non-moving party as well as view all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

FACTS AND PROCEDURAL HISTORY

Although the facts and the procedural history are well-known among the court and the parties, the court reiterates from its earlier memorandum opinion and order as follows:

> Varco at all relevant times was a participant in a health and welfare plan (the "Plan") provided by her employer and administered by Wal-Mart.[1] The Plan provides that it has a right to " recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of . . . any judgment, settlement or any payment made or to be made, relating to the accident, including but not limited to other insurance." The Plan further provides that it " does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the

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[1] Further background may be found in *Varco v. Lapsis*, 172 F. Supp. 2d 985, 987-88 (N.D. Ill. 2001).

participant."[2] After an automobile accident with Kristopher Lapsis ("Lapsis") during September, 2000, Wal-Mart paid medical benefits on behalf of Varco in the amount of $34,034.55. Varco filed a tort action in the Circuit Court of Cook County, Illinois, against Lapsis, and in October, 2001, in contemplation of settlement, Varco by and through her counsel, Dunford, sought adjudication of various liens, including that of Wal-Mart. Wal-Mart asked the state court to postpone adjudication of its lien and on October 4, 2001, removed the state court case to this court. The Honorable James A. Alesia, relying on *Blackburn v. Sundstrand Corp.,* 115 F.3d 493 (7th Cir. 1997), and *Speciale v. Seybold,* 147 F.3d 612 (7th Cir. 1998), held the case improperly removed and remanded it to the state court. *Varco v. Lapsis,* 172 F. Supp. 2d 985, 986-87 (N.D. Ill. 2001). On October 29, Wal-Mart filed this action. In early December, 2001, Dunford disbursed the settlement funds, while still subject to plaintiff's lien, to Varco and himself. Shortly thereafter, plaintiff sought emergency relief in this court to restrain defendants from further disposition of the funds until plaintiff's claim could be resolved. On December 14 and 21, 2001, this court granted plaintiff's motions for a temporary restraining order ("TRO") and preliminary injunction, respectively, because this court found that it had subject matter jurisdiction under *Administrative*

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[2] Varco concedes that she received the Plan's Associates Benefits Book, which includes these provisions. (Varco Aff. P2.) However, Varco attests that " she did not receive the plan and trust documents which created the duties and obligations of the parties[.]" (*Id.* P3.) Neither Varco nor her counsel attests that they made a discovery request for the documents.

Committee v. Gauf, 188 F.3d 767, 770 (7th Cir. 1999), and that plaintiff had a likelihood of success on the merits of a claim to impose a constructive trust[3] where plaintiff's counsel had disbursed the funds without an adjudication by *any* court of Wal-Mart's claim to share in the fund. On or about December 29, Dunford and Varco returned to state court with a motion to adjudicate Wal-Mart's lien. In response, plaintiff filed . . . an emergency motion pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, the All Writs Act, 28 U.S.C. § 1651, and "the *Princess Lida* doctrine" [4] to enjoin the state court from adjudicating plaintiff's right to reimbursement subject to the lien.

On January 3, 2002, this court requested that Dunford ask the state court to continue the motion to adjudicate the lien to permit this court to consider plaintiff's emergency motion. On January 4, 2002, the state court continued the matter to January 11, noting its own jurisdiction over the remanded *Lapsis* case and specifically over Varco's petition to adjudicate the right of Wal-Mart to reimbursement. On January 10, 2002, this court entered an order to stay the state court proceedings and to enjoin defendants from further proceeding in state court.

Administrative Committee v. Varco & Dunford, 2002 U.S. Dist. LEXIS 530, 2002 WL 47159, at *1-3 (N.D. Ill. Jan. 14, 2002).

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[3] The court relied on *Wal-Mart Stores, Inc. Assocs. Health and Welfare Plan v. Wells,* 213 F.3d 398, 403-04 (7th Cir. 2000).

[4] *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 466-67, 83 L. Ed. 285, 59 S. Ct. 275 (1939).

After this court stayed the state court proceedings and enjoined Dunford and Varco from proceeding in state court, on January 24, 2002, Wal-Mart removed for the second time Varco's personal injury action, *Varco* v. *Lapsis*, No. 02 C 0566, as the only remaining issue in that case was Varco's petition to adjudicate the lien of Wal-Mart, inasmuch as the state court, on Varco's motion, had dismissed all claims against all defendants, and no other liens were outstanding. On February 14, 2002, the removed case was reassigned to this court on grounds of relatedness. It is further noted that although the court was originally informed that the disputed monies could be traced to Dunford and Varco, Dunford has stated in open court that Varco holds all the disputed funds in a bank account. Moreover, because Blue Cross Blue Shield of Illinois, the Plan's third party administrator, was able to obtain discounts on Varco's medical expenses, the court on March 21, 2002, granted Varco's motion to amend the preliminary injunction by reducing the amount subject to it to $ 18,865.72.[5]

Wal-Mart filed a motion to dismiss the counterclaim, arguing that ERISA preempts the common fund doctrine where the Plan's terms state that the attorney's fees are the responsibility of the participant and not the Plan and, alternatively, if ERISA does not preempt the common fund doctrine, then it has no application because Varco's recovery enabled her to pay Dunford and reimburse the Plan. Wal-

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[5] When Dunford disbursed the settlement funds, Wal-Mart amended its original complaint to include Dunford as a defendant in its ERISA claim and also alleged state law claims of tortious inference with contractual relations and conversion. Dunford filed a counterclaim for attorney's fees. Subsequently, Dunford filed a motion for summary judgment on Wal-Mart's state law claims and his counterclaim.

Mart raised the same arguments in its response to Dunford's motion for summary judgment on his counterclaim. Because Dunford has already indicated that he received his full portion of attorney's fees from the settlement fund when he disbursed the monies and the disputed monies are in Varco's possession, Dunford has no claim against Wal-Mart.

Moreover, in response to Dunford's motion for summary judgment on the state law claims, Wal-Mart stated in its response brief that it would not object to the dismissal of its state law claims against Dunford now that the disputed monies are held by Varco. As such, the court construes Wal-Mart's brief in response as a motion for voluntary dismissal under Rule 41(a)(2), Fed. R. Civ. P., and dismisses the state law claims against Dunford.

As noted above, the disputed monies are in Varco's possession and not Dunford's and, thus, Wal-Mart no longer has an action against Dunford. As such, the court will dismiss Dunford as a defendant subject to Federal Rule of Civil Procedure 21 ("parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just"). Because Dunford has been paid, his counterclaim against Wal-Mart will be dismissed. As a consequence, Wal-Mart's motion to dismiss the counterclaim and Dunford's motion for summary judgment on his counterclaim are moot.

DISCUSSION

Wal-Mart seeks to enforce the reimbursement terms of the Plan pursuant to section 502(a)(3) of ERISA, 29 U.S.C.

§ 1132(a)(3).[6] (Pl. Mem. at 3.)[7] In response, Varco raises several grounds for why summary judgment should be denied, namely, (1) the court lacks jurisdiction to hear the instant case; (2) the Plan's provisions do not impose a contractual duty on Varco; (3) the Plan's provisions do not bar recovery of attorney's fees from the Plan; and (4) federal courts apply the common fund doctrine to ERISA actions.

A. The court's jurisdiction to hear ERISA claims

Varco resurrects her argument from her motion to dismiss that the court lacks subject matter jurisdiction to hear the instant case. Specifically, Varco asserts that the court's imposition of the constructive trust subject to its preliminary injunction is not "other appropriate equitable relief" under §

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[6] The civil enforcement section of ERISA provides, in relevant part,

> (a) Persons empowered to bring a civil action
> A civil action may be brought-
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter of the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3).

[7] Wal-Mart also seeks the same amount according to an equitable lien and restitution. (Pl. Mem. at 3.) However, on January 14, 2002, the court dismissed all of Wal-Mart's claims for equitable relief with the exception of its " claim for the imposition of constructive trust on particular property in the hands of the defendants and for the pendent state law claims." *Administrative Committee,* 2002 U.S. Dist. LEXIS 530, 2002 WL 47159, at *4.

502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3)(B), but is rather merely a legal claim. Varco relies on *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) and *Bauhaus USA, Inc. v. Copeland,* 292 F.3d 439 (5th Cir. 2002). The Court in *Great-West Life* held that section 502(a)(3), which authorizes a fiduciary to bring an action for appropriate equitable relief, did not authorize a suit by an ERISA plan against a beneficiary for reimbursement where the settlement funds (derived from the personal injury suit) had already been distributed to a special needs trust for the beneficiary's care and to the beneficiary's attorney in the state court action and lien holders (including a small portion to the ERISA plan), on the basis that the relief sought was legal relief. 534 U.S. at 204, 122 S. Ct. at 714-17. This court considered *Great-West Life* in its January 14, 2002 opinion and found it distinguishable. It will not revisit it here.

Bauhaus was decided May 21, 2002 and, thus, not previously considered by this court. In *Bauhaus*, the court affirmed the lower court's dismissal of an ERISA plan administrator's declaratory judgment action to enforce the terms of an employee benefit plan in order to obtain a portion of the participant's settlement funds in a tort suit. Treating the case as "indistinguishable in principle" from *Great-West Life*, the court affirmed the district court's dismissal. Significantly for our purposes here, the court compared the *Great West Life* facts, where the funds were in possession of a private special needs trust, to the *Bauhaus* facts, where the funds were in the registry of the court, and reasoned that the claim was still for legal rather than equitable relief because the defendants, participants and beneficiaries of the ERISA plan, "like the Knudsons in *Great-West*, are not in possession of the disputed funds, a fact that Justice Scalia found extremely important in *Great-West*." 292 F.3d at 445.

In this court's prior decision on Varco's motion to dismiss, it stated that the facts in the instant case were distinguishable from *Great-West Life, Administrative Committee,* 2002 U.S. Dist. LEXIS 530, 2002 WL 47159, at *3. Specifically, this court determined that it had subject matter jurisdiction because Wal-Mart claimed it was rightfully entitled to a portion of the disbursed settlement funds and had sued Varco (and Dunford at the time), who were in possession of the funds, for restitution. Thus, the court assumed control of the monies by imposing a constructive trust over the funds. *Id.* For the same reasons, the instant case is also distinguishable from *Bauhaus. See Great-West Life & Annuity Ins. Co. v. Brown,* 192 F. Supp. 2d 1376, 1381 (N.D. Ga. 2002) ("Here, Defendant has placed the amount in controversy, which came directly from the settlement, in a non-interest bearing trust account. Therefore, the funds are identified and clearly traceable to the award from third parties. Accordingly, Plaintiff may seek restitution in equity"); *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt,* 211 F. Supp. 2d 812, 816 (N.D. Tx. 2002) (distinguishing *Great-West Life* and *Bauhaus* because the plaintiffs "do not seek to impose personal liability on Defendant. Instead, Plaintiffs seek a constructive trust over particular funds, separate and apart from Defendant's personal resources, and only to the extent of the benefits it provided"). Varco does not address this distinction that the monies Wal-Mart seeks from her are within her sole possession. For these reasons, the court adheres to its view that it has subject matter jurisdiction.[8]

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[8] Varco also makes the argument that Wal-Mart does not have a superior moral or equitable claim to the funds. This seems to be an argument that pertains to who is the "true owner" of the *res* once a constructive trust has been imposed. As it does not seem pertinent to jurisdiction, the court disregards this portion of Varco's

B. Varco's contractual duty under the Plan

Varco next argues that the provisions set forth in the Associates Benefits Book do not impose a contractual duty on her. Varco points to a provision in the Associates Benefits Book, which provides:

> This booklet explains the principal provisions of each of Wal-Mart's benefit programs in simple language. However, if there is a disagreement between this booklet and the legal documents (plan text, trust agreements or insurance contract), which define the benefits of these plans, the legal documents will always govern.

(Varco Aff. Ex. A.) Varco asserts that because the Associates Benefits Book includes the statement "the legal documents will always govern" and she has not been provided these legal documents, a genuine issue of material fact exists as to her contractual duty under the Plan. In response, Wal-Mart provides a "Wrap Document," which incorporates the Associates Benefits Book. Wal-Mart contends that the Wrap Document and the Associates Benefits Book constitute "the Plan."

Varco's argument is frivolous on its face, lacking in reason or authority. *See Health Cost Controls of Illinois v. Washington,* 187 F.3d 703, 710 (7th Cir. 1999) ("When . . . the plan and the summary plan description conflict, the former governs, being more complete-the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to

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argument.

be intelligible to lay persons-unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment"). Moreover, Varco points to no discovery request for the documents she does not have or any disagreement between the Associates Benefits Book and the full Plan documents concerning Varco's contractual duty under the Plan and Wal-Mart's right to reimbursement. Therefore, no genuine issue of material fact exists that the Plan imposes a duty on Varco to reimburse Wal-Mart for the medical payments advanced on her behalf.

C. The Plan's provisions on attorney's fees

Varco further contends that the language relied on by Wal-Mart for full reimbursement does not bar recovery of her attorney's fee from the Plan. Essentially, she recasts the issue as one of who will pay Wal-Mart's share of Dunford's fee and argues that the Plan does not address it. Specifically, Varco points to the various provisions in the Plan, which state:

> The Plan has the right to . . . recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf . . . to the extent of any of the following payments: . . . . Attorneys fees
>
> * * *
>
> **NOTES:**
> The Plan does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant.

(Varco Aff. Ex. A.) Varco reasons that if the Plan intended that she should pay Wal-Mart's share of her attorney's fee, then those terms should have been included in the Associates

Benefits Book.[9] Again, this argument is specious. It is merely an attempt to address the applicability of the common fund doctrine, discussed below, and will be treated as such.

D. The applicability of the common fund doctrine

The Illinois common fund doctrine provides that where an attorney's work generates a fund, the attorney is entitled to be paid from that fund and the beneficiaries of the fund are only entitled to the proceeds net of their proportionate share of the legal expense. *Blackburn,* 115 F.3d at 494. It is a common law "equitable exception" to the general, or "American" rule, that each party to litigation bears its own attorney fees, absent a fee-shifting statute, *Scholtens v. Schneider,* 173 Ill. 2d 375, 384, 671 N.E.2d 657, 662, 219 Ill. Dec. 490 (1996), and is based on the concept of unjust enrichment. 173 Ill. 2d at 385, 671 N.E.2d at 663 ("Unless the costs of litigation are spread to the beneficiaries of the fund, they will be unjustly enriched by the attorney's efforts"). *Accord, Boeing Co. v.*

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[9] Varco relies on language in the recent decision of the Illinois Supreme Court in *Bishop v. Burgard,* 198 Ill. 2d 495, 499, 764 N.E.2d 24, 28, 261 Ill. Dec. 733 (2002), where the court, in describing the terms of the ERISA plan, pointed out that the " plan provisions do not expressly repudiate the common fund doctrine, nor do they specifically state that the participant will be obligated to pay *the plan's* attorney fees." (emphasis in original).

Varco also points to the section "Cooperation Required," which has a provision that requires the participant to cooperate in the Plan's recovery of the payments made by the Plan. Based on this provision, she makes the policy argument that the Plan may force a participant to hire an attorney and be forced to pay attorney's fees that would benefit only the Plan. Although this situation may occur, these are not the facts before this court.

Van Gemert, 444 U.S. 472 at 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 ("The common fund doctrine reflects the traditional practice in courts of equity . . . and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees").

The reimbursement provision of the Plan requires 100% reimbursement and proclaims that the Plan is not responsible for paying the participant's attorney's fee when the participant recovers medical expenses. Despite this provision, Varco contends that under the common fund doctrine the Plan is obligated to pay its share of her attorney's fee. Varco relies on favorable dicta in *Administrative Committee v. Wells,* 213 F.3d 398, 403 (7th Cir. 2000), as well as the recent pronouncement of the Illinois Supreme Court in *Bishop v. Burgard,* 198 Ill. 2d 495, 510, 764 N.E.2d 24, 34, 261 Ill. Dec. 733 (2002), which holds that despite an ERISA plan's contractual language requiring 100% reimbursement, the common fund doctrine requires the Plan to bear its proportionate share of the participant's attorney's fee.[10]

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[10] *Bishop* held on facts very similar to those presented here that ERISA does not preempt Illinois' common fund doctrine and that the doctrine applies even where the explicit terms of the plan require plaintiff to bear her attorney's fee. The court reasoned, quoting from its earlier decision in *Scholtens,* 173 Ill. 2d at 389-90, 671 N.E.2d at 664-65,

> "In effect, the attorney who performed legal services that ultimately led to the recovery of the plan's subrogation lien instituted a separate and distinct action against the Trustees for unpaid fees. The act, in substance if not in form, is wholly independent of and unrelated to the underlying benefit plan."

Bishop, 198 Ill. 2d at 504, 764 N.E.2d at 31.

Wal-Mart dismisses *Bishop* as having already had its holding rejected by federal courts,[11] arguing that it is inconsistent with *Egelhoff v. Egelhoff,* 532 U.S. 141, 152, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (2001) (ERISA preempts state law providing that designation of spouse as beneficiary of a non-probate asset is revoked automatically on divorce), *Health Cost Controls of Illinois,* 187 F.3d at 710 (reimbursement provisions of an ERISA plan document entitled the assignee of the beneficiary to reimbursement out of third party recovery), and *Harris Trust and Savings Bank v. Provident Life and Accident Ins. Co.,* 57 F.3d 608, 615-16 (7th Cir. 1995) (ERISA plan entitled to reimbursement of expenses paid to employee out of third party recovery). Wal-Mart, further, accurately points out that the Seventh Circuit has never ruled, either as a matter of state or federal common law, that the common fund doctrine defeats the terms of an ERISA plan that expressly require participants to pay their own legal fees. *See Blackburn,* 115 F.3d at 496 (Although the common fund doctrine applied where the Plan did not specifically require participant to bear her own attorney's fee, the court commented, "A plan might have a better argument

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[11] *See, e.g., Great-West Life and Annuity Ins. Co. v. Moore,* 133 F. Supp. 2d 677, 680 (N.D. Ill. 2001) (concluding the bank holding the funds in dispute should be ordered to turn over the funds to the plan fiduciary in accordance with the plan's terms and not with the common fund doctrine); *Fairfield Mfg. Co. v. Hartman,* 132 F. Supp.2d 1142, 1146 (N.D. Ill. 2001) (holding common fund doctrine inapplicable where plan provision expressly disclaimed obligation to pay participant's attorney's fees); *McCotter v. Longo,* 1997 U.S. Dist. LEXIS 15357, 1997 WL 630188, at (N.D. Ill. Sept. 30, 1997) ("Unlike the plan in *Blackburn*, the Plan here expressly provides that its right to reimbursement will not be reduced by the covered person's own negligence or attorney's fees and costs . . . *Blackburn's* holding is inapplicable here. . . .").

if its governing documents expressly required participants to pay their own legal fees . . . and to remit the gross rather than the net proceeds from litigation"); *Wells,* 213 F.3d at 403 ("We need not consider whether [Indiana] 'common fund' law is applicable . . . ."). Further supporting Wal-Mart, the Seventh Circuit has stated, in *dicta* but plainly, that " because ERISA supersedes any and all state laws relating to covered plans, . . . [the Illinois common fund] doctrine is not available to [the beneficiary] [where] the terms of the plan require reimbursement of the entire amount without the deduction of any attorney's fees." *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund,* 25 F.3d 509, 510 (7th Cir. 1994).

However, as the Seventh Circuit three years after *Land* stated in *Blackburn*, "The status of the state's common-fund doctrine is a recurring question that should be clarified . . . ." In holding that the federal court lacked jurisdiction over a claim that the common fund doctrine applied to a third party recovery or over the Plan's preemption defense, the court in *Blackburn* specifically ruled: "The Illinois common-fund doctrine is not preempted . . . . *Scholtens v. Schneider,* 173 Ill. 2d 375, 219 Ill. Dec. 490, 671 N.E.2d 657 (1996), holds that § 514(a) does not preempt the common-fund doctrine. We agree with *Scholtens*." 115 F.3d at 495.

If the law is as *Blackburn* says and as *Wells* indicates, the common fund doctrine is not preempted and state courts have jurisdiction to rule on the federal defense (if it exists where a fiduciary is concerned).[12] Until *Bishop* was decided, an

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[12] *Great West Life* ruled that the fiduciary had no claim under § 502(a)(3). It reserved the possibility that a remedy might otherwise be available, stating, "We express no opinion as to

ERISA plan that specifically required the participant to bear her attorney's fee could be distinguished from *Scholtens* and *Wells*, as the federal courts have consistently done. It would be anomalous, however, for this court in this rare case in federal court[13] to adhere to the view that the common fund doctrine does not apply where the "run of the mine" case of this sort will be decided in the Illinois courts and governed by *Bishop*. If *Bishop* was wrongly decided, only the United States Supreme Court or the legislature can overrule it.

Egelhoff does not require this court to assume that *Blackburn* and *Wells* are incorrect, as it treats ERISA preemption in another context. *Land* is an earlier statement where the issue was not directly litigated, so it does not undermine *Blackburn* and *Wells*. Under these authorities, then, summary judgment as Wal-Mart has sought, is appropriate because Varco has money to which Wal-Mart has a superior claim. But because the Plan must bear its proportional share of Dunford's fee, Wal-Mart is entitled only to restitution net of its proportionate share of the legal expenses.

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whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA," *Great-West Life*, 534 U.S. at 204, 122 S. Ct. at 718.

[13] After the *Great West Life* decision, however, few cases will be decided in the federal courts. Only because the pending case arises in equity as a result of the unique circumstance in which Dunford distributed the settlement monies without the state court's blessing, is this case in federal court. Had this not occurred, under *Great-West Life* Wal-Mart's claim for reimbursement subject to the terms of the Plan would be a legal claim be in state court.

ORDER

Wherefore, for the reasons set forth above, Wal-Mart's motion for summary judgment is granted [# 12] in the form of restitution in the amount of $18,865.72 less Wal-Mart's proportionate share of Dunford's fee and Varco's costs, plus prejudgment interest. Counts III and IV of Wal-Mart's complaint are voluntarily dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2). The court dismisses Dunford as a defendant and Dunford's counterclaim against Wal-Mart under Federal Rule of Civil Procedure 21. Wal-Mart's motion to dismiss the counterclaim [# 52-1] and Dunford's motion for summary judgment on his counterclaim [# 47-1] are moot. The parties are directed to submit a proposed decree, consistent with this opinion, requiring restitution of a precise amount of money. The case is placed on the status call for Tuesday, October 29, 2002 at 9:30 a.m. at which time the parties shall appear should they be unable to agree on an appropriate form of order.

ENTER:

/s/
JOAN HUMPHREY LEFKOW
United States District Judge

Dated: October 2, 2002

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 01-C-8277
[Decided Jan. 14, 2002]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN,
Plaintiff,

vs.

CLARA VARCO and LAURENCE DUNFORD,
Defendants.

JUDGE: JOAN HUMPHREY LEFKOW, United States District Judge.

MEMORANDUM DECISION AND ORDER

This is an original action filed by Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan ("Wal-Mart"), a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, asserting claims under

section 502(a)(3) of ERISA,[1] for "appropriate equitable relief," including an injunction, declaration of rights, specific performance, imposition of constructive trust, and restitution against defendants Clara Varco ("Varco") and her attorney, Laurence Dunford ("Dunford").[2] Jurisdiction is alleged under section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).[3] Both defendants have moved to dismiss the first amended verified complaint and have made several other motions.[4] Plaintiff has moved this court to stay proceedings in a related state court proceeding and to enjoin defendants from further adjudicating the matter in state court.[5] For the reasons set forth below, the

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[1] Section 502(a)(3) of ERISA provides that "[a] civil action may be brought . . . by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3).

[2] Plaintiff also asserts claims Illinois common law of breach of contract by Varco and tortious interference of contractual relations by Dunford.

[3] With exceptions not applicable here, "the district courts of the United States . . . have exclusive jurisdiction of civil actions under this subchapter brought by . . . a . . . fiduciary . . . ." 29 U.S.C. § 1132(e)(1). *Administrative Committee v. Gauf,* 188 F.3d 767, 770 (7th Cir. 1999).

[4] Defendants' other motions include a motion to strike plaintiff's first amended verified complaint by Dunford and a motion to vacate the court's preliminary injunction by Varco.

[5] Due to the nature of the case and the language of the Anti-Injunction Act, 28 U.S.C. § 2283, the court addresses plaintiff's emergency motion as a motion to stay the state court proceedings

court grants in part and denies in part defendants' motions to dismiss, denies defendants' remaining motions as moot, grants plaintiff's motion to stay the state court proceedings on the ERISA matter, and grants plaintiff's motion to enjoin defendants from proceeding further in state court.

FACTS AND PROCEDURAL HISTORY

Varco at all relevant times was a participant in a health and welfare plan (the "Plan") provided by her employer and administered by Wal-Mart.[6] The Plan provides that it has a right to " recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of . . . any judgment, settlement or any payment made or to be made, relating to the accident, including but not limited to other insurance." The Plan further provides that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant." After an automobile accident with Kristopher Lapsis ("Lapsis") during September, 2000, Wal-Mart paid medical benefits on behalf of Varco in the amount of $34,034.55. Varco filed a tort action in the Circuit Court of Cook County, Illinois, against Lapsis, and in October, 2001, in contemplation of settlement, Varco by and through her counsel, Dunford, sought adjudication of various liens, including that of Wal-Mart. Wal-Mart asked the state court to postpone adjudication of its lien and on October 4, 2001, removed the state court case to this court. The Honorable James A. Alesia, relying on *Blackburn v.*

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and to enjoin defendants from further proceeding in state court to resolve the ERISA matter.

[6] Further background may be found in *Varco v. Lapsis,* 172 F. Supp. 2d at 987-88 (N.D. Ill. 2001).

Sundstrand Corp., 115 F.3d 493 (7th Cir. 1997), and *Speciale v. Seybold*, 147 F.3d 612 (7th Cir. 1998), held the case improperly removed and remanded it to the state court. *Varco v. Lapsis*, 172 F. Supp. 2d 985, 986-87 (N.D. Ill. 2001). On October 29, Wal-Mart filed this action. In early December, 2001, Dunford disbursed the settlement funds, while still subject to plaintiff's lien, to Varco and himself. Shortly thereafter, plaintiff sought emergency relief in this court to restrain defendants from further disposition of the funds until plaintiff's claim could be resolved. On December 14 and 21, 2001, this court granted plaintiff's motions for a temporary restraining order ("TRO") and preliminary injunction, respectively, because this court found that it had subject matter jurisdiction under *Administrative Committee v. Gauf*, 188 F.3d 767, 770 (7th Cir. 1999), and that plaintiff had a likelihood of success on the merits of a claim to impose a constructive trust[7] where plaintiff's counsel had disbursed the funds without an adjudication by *any* court of Wal-Mart's claim to share in the fund. On or about December 29, Dunford and Varco returned to state court with a motion to adjudicate Wal-Mart's lien. In response, plaintiff filed the motion which this opinion principally addresses: an emergency motion pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, the All Writs Act, 28 U.S.C. § 1651, and "the *Princess Lida* doctrine" [8] to enjoin the state court from adjudicating plaintiff's right to reimbursement subject to the lien.

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[7] The court relied on *Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Wells*, 213 F.3d 398, 403-04 (7th Cir.), *cert. denied*, 531 U.S. 985, 121 S. Ct. 441, 148 L. Ed. 2d 447 (2000).

[8] *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466-67, 83 L. Ed. 285, 59 S. Ct. 275 (1939).

On January 3, 2002, this court requested that Dunford ask the state court to continue the motion to adjudicate the lien to permit this court to consider plaintiff's emergency motion. On January 4, 2002, the state court continued the matter to January 11, noting its own jurisdiction over the remanded *Lapsis* case and specifically over Varco's petition to adjudicate the right of Wal-Mart to reimbursement. On January 10, 2002, this court entered an order to stay the state court proceedings and to enjoin defendants from further proceeding in state court. This opinion sets forth this court's reasoning for its order.

ANALYSIS

I. Subject matter jurisdiction

In opposition to plaintiff's motion, defendants contend that this court lacks subject matter jurisdiction because Wal-Mart is seeking monetary and not equitable relief under § 502(a)(3) and, in light of the remand of the *Lapsis* case to the state court, defendants believe they are entitled to have the state court adjudicate Wal-Mart's lien. The rule of *Blackburn* and *Speciale* is that a fiduciary of an ERISA plan is not entitled to remove a personal injury action to federal court on the basis that the state court's jurisdiction is pre-empted by ERISA, even though "conflict preemption" under section 514(a) requires the state court to apply federal law to issues governed by ERISA.[9] In *Speciale*, the court concluded, "In a state cause of action where there are adversarial claims to a

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[9] Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides, as relevant here, "The provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."

settlement fund between an ERISA plan subrogation claim and other statutory medical liens, there is no preemption under § 502(a) and the allocation of funds is a matter for the state court under which original jurisdiction arose." 147 F.3d at 616. Nevertheless, where a fiduciary of an ERISA plan files a complaint in federal court which states a claim for equitable relief, a federal court has exclusive jurisdiction to decide the claim. *Gauf,* 188 F.3d at 771*; see Spitz v. Tepfer,* 171 F.3d 443, 447 (7th Cir. 1999). Thus, the issue before this court is whether plaintiff's complaint states a claim for equitable relief.

Great-West Life & Annuity Insurance Company v. Knudson, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, 2002 U.S. LEXIS 399, 2002 WL 15399 (U.S. 2002), held that section 502(a)(3) does not authorize a suit by an ERISA plan against a beneficiary for reimbursement where the settlement funds (derived from the personal injury suit) had already been distributed to a special needs trust for the beneficiary's care, the beneficiary's attorney in the state court action, and lien holders (including a small portion to the plan). Specifically, the Court reasoned that a complaint under § 502(a)(3)(A) for an injunction requiring restitution could not be properly characterized as equitable relief but was actually a claim for damages for breach of contract. Defendants contend that this case is within *Great-West Life* and therefore must be dismissed. This court would agree but for the facts that, unlike in *Great-West Life*, Wal-Mart here claims that it is rightfully entitled to a portion of the settlement funds and has sued the individuals who have possession of them, and this court has assumed control of those funds by imposing a constructive trust by virtue of its preliminary injunction.

Defendants have argued that this court cannot impose a constructive trust because there was no *res* after Dunford

disbursed the funds to Varco and himself. The court disagrees. As stated in *Great West Life*,

> [A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) . . . to a plaintiff who was, in the eyes of equity, the true owner. But where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust . . . upon other property of the [defendant].' Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

2002 U.S. LEXIS 399, 2002 WL 15399, Part II, sec. B, P 3 (internal citations omitted). Where, as here, Dunford disbursed the settlement funds without obtaining adjudication of the lien in the state court and where Wal-Mart filed an original action to impose a constructive trust to avoid dissipation before its right to share in the fund could be adjudicated, a *res* exists over which this court has assumed jurisdiction. *See id.* This is a request for equitable relief and therefore this court has exclusive jurisdiction under 29 U.S.C. § 1132(e)(1).

II. Stay of state court proceedings

Wal-Mart relies on a variety of authorities in support of its position that this court should prevent the state court, which has before it Varco's belated motion to adjudicate Wal-Mart's lien, from proceeding. It cites to the "in aid of jurisdiction" exception in the Anti-Injunction Act, 28 U.S.C. § 2283, the "in aid of jurisdiction" authority in the All Writs Act, 28 U.S.C. § 1651, and the *Princess Lida* doctrine, from *Princess Lida of Thurn and Taxis v. Thompson et al.*, 305 U.S. 456, 466-67, 83 L. Ed. 285, 59 S. Ct. 275 (1939).[10] "This case is

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[10] The Anti-Injunction Act states "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

The All Writs Act states that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The *Princess Lida* doctrine provides,

> It is settled that where the judgment sought is strictly in *personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other. . . . On the other hand, if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. . . . We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that

by no means an easy one." *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 296, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970). The court is loathe to interfere with the proceedings in the state court. Nevertheless, courts have stayed or enjoined state court proceedings when the state court proceedings will frustrate the proceedings in the federal court.[11] *See In re Bankamerica Corp. Secs. Litig.,* 263 F.3d

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> jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. . . . The doctrine is necessary to the harmonious cooperation of federal and state tribunals. . . . While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right of his interest as a basis of a claim against a fund in the possession of a state court, . . . this is not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

Princess Lida of Thurn and Taxis, 305 U.S. at 466-67 (1939) (internal citations omitted).

[11] The court recognizes that stay or enjoinment of state court proceedings may appear to strain the principles of comity. *See Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996); *Propper v. Clark,* 337 U.S. at 493, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949) ("Comity does not require abnegation to the extent that a federal court cannot adjudicate the rights to the claim involved."). In fact, the procedural posture of this case creates confusion for all parties, the

795, 802-03 (8th Cir. 2001); *In re Inter-Op Hip Prosthesis Prod. Liab. Litig.*, 174 F. Supp. 2d 648, 2001 WL 1540552, at *5 (N.D. Ohio, 2001); *In re Consol. Welfare Fund "ERISA" Litig., Dep't of Labor v. Goldstein*, 798 F. Supp. 125, 127 and n.3 (S.D.N.Y. 1992). Defendants rely on a variety of cases in which the state (or foreign) court had concurrent jurisdiction and the federal court refused to enjoin or stay those proceedings even though the risk of inconsistent outcomes existed. *See, e.g., National Basketball Ass'n v. Minnesota Prof'l Basketball, Ltd. P'ship*, 56 F.3d 866, 872 (8th Cir. 1995) (holding, in part, to reverse district court's relieving the NBA from the state court's preliminary injunction because "a preliminary injunction is a protectable judgment under the relitigation exception in § 22[8]3 "); *see also Atlantic Coast Line R.R. Co.*, 398 U.S. at 294-97 (stating that "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts[.]"). Because this court has exclusive jurisdiction over the property, however, these cases are distinguishable. *See Green v. Green*, 233 F.2d 642, 644 (7th Cir. 1956) (holding that the federal court could enjoin a defendant from proceeding in state court because the federal court had *in rem* jurisdiction and control over the res); *see also Bowles v. Willingham*, 321 U.S. 503, 512, 88 L. Ed. 892, 64 S. Ct. 641 (1944) (holding in part that Congress established the federal district courts' exclusive jurisdiction to adjudicate certain matters under the Emergency Price Control Act); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235, 67 L.Ed. 226, 43 S.

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state court and the federal court. Unlike the court in *Dailey v. The National Hockey League*, 987 F.2d 172 (3rd Cir. 1993), this court finds itself in the awkward position of having its jurisdiction questioned by a state court in adjudicating plaintiff's reimbursement subject to either ERISA or the lien.

Ct. 79 (1922) (upholding "that where an action is one in rem that court-- whether state or federal-- which first acquires jurisdiction draws itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank."); *Goehring v. Harleysville Mut. Cas. Co.*, 460 Pa. 138, 145, 331 A.2d 457, 460 (1975); cf. Propper v. Clark, 337 U.S. 472, 491-91, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949) (stating that "as the state court could reasonably require complete adjudication of the controversy, the District Court would perhaps be compelled to stay proceedings in the state court to protect its own adjudication. 28 U.S.C. § 2283."); *Levy v. Lewis,* 635 F.2d 960, 967 (2d Cir. 1980) (while holding that ERISA did not apply to the case, the court recognized that "federal courts must hear claims within their exclusive jurisdiction, for otherwise the right alleged would never fully be adjudicated.").

In light of cases such as *Bishop v. Burgard,* 317 Ill.App.3d 923, 251 Ill. Dec. 712, 741 N.E.2d 306, (3rd Dist. 2000), *on appeal*, 197 Ill. 2d 565, 747 N.E.2d 351 (2001), where the Illinois Appellate Court ruled that terms of the health and welfare plan superseded the Illinois common fund doctrine, and further where there is no great likelihood of inconsistent rulings had Dunford obtained adjudication of the lien rather than simply disbursing the funds, this court would take a different view. But because it became necessary for Wal-Mart to seek preliminary injunctive relief in this court, the court has assumed exclusive jurisdiction over the *res* and must require defendants to litigate in the federal forum. Because this is the only remaining issue pending before the state court, it is necessary to require the state court, in aid of this court's jurisdiction, to defer to the jurisdiction of the federal court.

ORDER

For the above-stated reasons, this court denies in part defendants' motions to dismiss plaintiff's first amended verified complaint [# 8-1] [# 10-2], insofar as it states a claim for imposition of constructive trust on particular property in the hands of the defendants and for the pendent state law claims, but grants in part defendants' motions to dismiss plaintiff's other claims for equitable relief. It denies defendants' remaining motions as moot, including Dunford's motion to strike plaintiff's first amended verified complaint [# 10-1] and Varco's motion to vacate the preliminary injunction. This court grants plaintiff's motion for this court to stay the state court proceedings and enjoin the defendants from further proceedings in state court [# 20-1] pursuant to its Order of January 10, 2002. All other motions are continued to January 21, 2002, at 9:30 a.m.

ENTER:

JOAN HUMPHREY LEFKOW
United States District Judge

Dated: January 14, 2002

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 1:01-CV-8277
[Filed Dec. 10, 2001]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN, Plaintiff,	)
v.	)
CLARA VARCO AND LAURENCE DUNFORD, Defendants.	)

FIRST AMENDED VERIFIED COMPLAINT

Plaintiff, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan, pleads as follows:

1. This action to enforce the terms of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan") and for equitable relief arises under the Employee Retirement

Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

PARTIES

2. Plaintiff is a fiduciary of the Plan and, as such, is entitled to bring this action pursuant to 29 U.S.C. § 1132(a)(3).

3. Upon information and belief, Defendant Varco is a citizen and resident of the State of Illinois.

4. Upon information and belief, Defendant Dunford is a citizen and resident of the State of Illinois.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332, and 29 U.S.C. § 1132 because this action to enforce provisions of the Plan arises under ERISA. Furthermore, under 28 U.S.C. § 1367, this Court has supplemental jurisdiction over all state law claims herein since such claims form part of the same case or controversy.

5. Pursuant to 29 U.S.C. § 1132(e)(2), venue is proper in this Court.

FACTUAL ALLEGATIONS

6. Defendant was a "Covered Person" under the terms of the Plan, which is self-funded.

7. Defendant Varco was injured in a personal injury accident in 2000, and sought to recover from the parties who caused those injuries.

8. In connection with the injuries suffered by Defendant, the Plan paid medical benefits on behalf of Defendant Varco in the amount of $34,035.55.

9. The Plan contains a reimbursement and right of recovery provision, which states:

RIGHT TO RECOVER OVERPAYMENT

Payments are made in accordance with the provisions of the Plan. If it is determined that payment was made for an ineligible charge or other insurance was considered primary, the Plan has the right to recover overpayment. The Plan will pursue overpayment from the party to whom the payment was issued. However, the Plan reserves the right to seek overpayment from you and/or your dependents if payment was made to the provider and the provider refuses to refund the Plan. Failure to comply with this request will entitle the Plan to withhold benefits due you and/or your dependents under the Plan Document. Furthermore, the Plan has the right to refer the file to an outside collection agency if internal efforts are unsuccessful.

RIGHT TO REDUCTION AND REIMBURSEMENT (SUBROGATION)

The Plan has the right to 1) reduce or deny benefits otherwise payable by the Plan and 2) recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of any and all of the following payments:

- Any judgment, settlement, or any payment made or to be made, relating to the accident, including but not limited to other insurance.

- Any auto or recreational vehicle insurance coverages or benefits including, but not limited to, uninsured/underinsured motorist coverage.

- Business and homeowners medical and/or liability insurance coverage or payments.

- Attorney's fees.

Cooperation Required

The Plan requires that you or your covered dependent cooperate to guarantee reimbursement to the Plan from third party benefits. Failure to comply with this request will entitle the Plan to withhold benefits due you or your dependents under the Plan Document. You or your covered dependents may not do anything to hinder reimbursement of overpayment to the Plan after you have accepted benefits.

All attorney's fees and court costs are the responsibility of the participant, not the Plan.

These rights apply regardless of whether such payments are designated as payment for, but not limited to:

- Pain and suffering;
- Medical benefits;
- Other specified damages;

- Whether the participant has been made whole (i.e., fully compensated for his/her injuries).

Additionally, the Plan has the right to file suit on your behalf for the condition related to the medical expenses to recover benefits paid or to be paid by the Plan.

NOTES:

- If you reside in a state where personal automobile injury protection or medical payment coverage is mandatory, the Plan takes secondary status. The Plan will reduce benefits for an amount equal to, but not less than, that state's mandatory minimum personal injury protection or medical payment requirement.

- The Plan has first priority with respect to its right to reduction, reimbursement and subrogation.

- The Plan is secondary to any excess insurance policy, including, but not limited to, school and/or athletic policies.

- The Plan has the right to reduce or withhold future benefits payments for your claims and your dependents' claims.

- The Plan will not pay for future medical charges related to the accident until medical charges have exceeded all amounts that were recovered, that should have been recovered, or are to be recovered by or on behalf of the participant.

- The Plan's section regarding the right to reduction, reimbursement and subrogation applies to the associate and to covered dependents.

- The Plan has the right to recover interest on the amount paid out by the Plan relating to the accident.

- The Plan has the right to recover the amount paid out relating to the accident in a lump sum.

- The Plan does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant.

- The right of reduction, reimbursement and subrogation is based on the Plan language in effect at the time of judgment, payment, or settlement.

Participant's Responsibility Regarding Right of Reduction and/or Recovery

To aid the Plan in its enforcement of its right of reduction, recovery, reimbursement, and subrogation, the participant must, at the Plan's request and at its discretion:

- Take any action;
- Give information;
- Execute documents so required by the Plan.

Failure to aid the Plan and to comply with such requests may result in the Plan withholding or recovering benefits, services, payments, or credits due or paid by under the Plan.

> The Plan's right to reimbursement occurs when the Plan pays your charges relating to an accident while waiting for a third party to make payment to you or to someone else on your behalf. Repayment to the Plan of 100 percent will be made at the time the payment is received by you, your attorney, or other person on your behalf.

10. Defendant Varco has recovered $100,000.00 because of her injuries.

11. Varco was represented by Defendant Dunford.

12. Defendant Dunford was aware of the Plans' right of reimbursement. In fact, Dunford, despite filing of this lawsuit, settled all of Varco's claims and, according to Dunford, disbursed the settlement funds to himself and Ms. Varco despite the pendency of this action. A true and correct copy of correspondence between counsel for the Plaintiff and Defendant Dunford is attached as Exhibit A hereto.

13. To date, all Defendants have refused to reimburse the Plan in accordance with the Plan terms.

I. PRELIMINARY INJUNCTION

14. Pursuant to Fed.R.Civ.P. 65, upon notice and hearing, Plaintiff is entitled to a preliminary injunction enjoining Varco, and all those acting in concert or participating with her from disposing of $34,035.55 of the $100,000 in settlement funds, pending a final determination by this Court. If Defendant Varco is able to place these monies beyond the reach of Court, then Varco may deprive the Court of the ability to impose an equitable remedy.

II. ENFORCEMENT OF THE TERMS OF THE PLAN

15. Pursuant to 29 U.S.C. § 1132(a)(3),Plaintiff seeks equitable relief, including, but not limited to, an injunction, declaration of rights under the Plan, specific performance, constructive trust, and restitution against Defendant to enforce ERISA and the terms of the Plan.

16. By refusing to reimburse the Plan to the extent of benefits paid out of the amount she recovered, Defendants have violated the terms of the Plan.

17. Since these acts and/or practices violate the Plan's terms, this Court should enter an order requiring Defendants to reimburse the Plan in the amount of $34,035.55.

III. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

18. Defendant Dunford is liable for tortious interference with contractual relations.

19. Specifically, Dunford willfully and intentionally interfered with the Plan's contractual relations with Defendant Varco. See Exhibit A hereto.

20. Defendants Dunford' s conduct in negotiating the settlement check and disbursing the funds to Varco or in failing to reimburse the Plan was a proximate cause of the Plan's damages.

21. The Plan has been damaged in the amount of $34,035.55. because of Defendant's conduct.

IV. CONVERSION

22. Defendant Dunford received the $100,000 for Defendant Varco. Defendant Dunford was aware of the Plans' entitlement to $34,035.55 prior to receiving the settlement payment for Varco. Defendant Dunford intentionally and wrongfully asserted dominion and control over the settlement payment, inconsistent with the Plan's ownership of its portion of the settlement payment.

V. PRAYER FOR RELIEF

Plaintiff requests that the Court enter an order granting a declaratory judgment, injunction, specific performance, constructive trust, and restitution against Varco, requiring Defendant Varco to turn over $34,035.55, including appropriate pre-judgment and post-judgment interest. Plaintiff also requests that the Court enter an order requiring Defendant Dunford to pay the Plan $34,035.55, including appropriate pre-judgment and post-judgment interest, and for any other relief to which the Plan is entitled and that the Plan be awarded reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g).

Date: December 7, 2001.

Respectfully submitted,
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue
Suite 1617
Memphis, Tennessee 38157
Telephone: (901) 844-4430
Facsimile: (901)844-4435

By:/s/_____
Thomas H. Lawrence
John M. Russell

Attorneys for Plaintiff Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan

VERIFICATION

I, Ann C. Cato, verify under penalty of perjury that the forgoing is true and correct.

/s/
Ann C. Cato

Executed on December 6, 2001.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 01-C-7695
[Decided Nov. 15, 2001]

CLARA VARCO and KIMBERLY SORIA, Plaintiffs,	)
v.	)
KRISTOPHER LAPSIS, Defendant.	)

JUDGE: James H. Alesia, United States District Judge.

MEMORANDUM OPINION AND ORDER

Before the court is plaintiff Clara Varco's ("Varco") motion to remand this action to the Circuit Court of Cook County, Law Division, for lack of subject matter jurisdiction. For the following reasons, the court grants Varco's motion to remand.

I. BACKGROUND

Wal-Mart Stores, Inc. ("Wal-Mart") provides its employees benefits through The Wal-Mart Stores, Inc.

Associates' Health and Welfare Plan (the "Plan"), a self-funded employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The administrator of this Plan is the Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan. The Plan includes a provision stating that the Plan has a right to "recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependants to the extent of ... any judgment, settlement or any payment made or to be made, relating to the accident, including but not limited to other insurance."

Varco was an employee of Wal-Mart and a participant in the Plan. On September 24, 2000, Varco and Kimberly Soria suffered injuries as a result of an automobile accident with Kristopher Lapsis ("Lapsis"). The Plan paid medical benefits on behalf of Varco in the amount of $34,034.55.

Varco filed a personal injury action against Lapsis in Illinois state court. In order to determine whether or not to accept a $20,000.00 settlement offer, Varco filed a motion to adjudicate liens in the state court. In her motion, Varco listed three providers, including "Blue Cross and Shield," who were claiming liens. On October 1, 2001, the Illinois state court judge entered an order determining the rights of some lienholders and continuing the matter as to Blue Cross/Blue Shield to October 12, 2001.

On October 4, 2001, the Wal-Mart Committee,[1] acting independently, removed the action to the federal district court under 28 U.S.C. §§ 1441(a), (b), and (c), maintaining that because the Plan was governed by ERISA, Varco's motion to adjudicate was completely preempted under § 502(a) of ERISA, 29 U.S.C. § 1132(a). Varco now moves to remand the action to the Circuit Court of Cook County, pursuant to 28 U.S.C. § 1447, asserting that this court does not have subject matter jurisdiction. The court agrees with Varco.

II. DISCUSSION

Speciale v. Seybold, 147 F.3d 612 (7th Cir. 1998), a nearly identical scenario to the immediate case, is directly controlling. In that case, the Seventh Circuit stated, "the determination of jurisdiction on removal involving an ERISA issue is based upon the well-pleaded complaint rule, the ERISA 'complete preemption' exception to that rule and the defense of 'conflict preemption' under ERISA." *Speciale,* 147 F.3d at 614 (citations omitted). Under 28 U.S.C. § 1441, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant ... to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). District courts have original jurisdiction over cases concerning a "federal question," that is, cases "arising under the

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[1] In its notice of removal, movant refers to itself as "Defendant, Blue Cross Blue Shield of Illinois." However, in its response in opposition to plaintiff's motion to remand, it refers to itself as "Defendant, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan" and claims it was misnamed as Blue Cross in the motion to adjudicate liens. The court will refer to movant as "the Wal-Mart Committee."

Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

In determining federal jurisdiction, the court generally first reviews the plaintiff's complaint, because "it is a long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Speciale,* 147 F.3d at 614 (quoting *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)). The issues raised in the plaintiff's complaint, not those added in the defendant's response, control the litigation. *Id.* (citing *Jass v. Prudential Health Care Plan, Inc.,* 88 F.3d 1482, 1482 (7th Cir. 1996)). The Supreme Court has emphasized that "the paramount policies embodied in the well-pleaded complaint rule [are] that the plaintiff is master of the complaint ... and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 398-99, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). This prevents the defendant from controlling the litigation and obtaining a transfer to federal court by federal preemption when the defendant raises a federal question in the responsive pleadings. *Speciale,* 147 F.3d at 614-15.

As the Seventh Circuit pointed out in *Speciale*, the Supreme Court created an exception to the well-pleaded complaint rule where Congress has completely preempted a given area of state law. *Speciale,* 147 F.3d at 615 (citing *Avco Corp. v. Aero Lodge No. 735, etc.,* 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968)). Complete preemption permits "recharacterization" of a plaintiff's state law claim as a federal claim so that removal is proper. *Id.* Whether or not a cause of action has been completely preempted is determined by the intent of Congress. *Id.* The Supreme Court has

explicitly expanded the "complete preemption" exception to include all state actions falling within the scope of § 502(a) of ERISA.[2] *Id.* (citing *Taylor,* 481 U.S. at 67).

However, as the Seventh Circuit pointed out, there is a second federal "preemption" doctrine. *Speciale,* 147 F.3d at 615.

> This doctrine serves as a defense to a state law action but does *not* confer federal question jurisdiction. This doctrine is known as "conflict preemption." Conflict preemption is based upon § 514(a)[3] of ERISA. "Complete preemption" under § 502(a) encompasses all claims by a participant or beneficiary to *enforce his rights* under an ERISA plan whereas "conflict preemption" under § 514(a) preempts any state law

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[2] Section 502(a) of ERISA provides:

> A civil action may be brought --
>
> (1) by a participant or beneficiary --
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan ...

[3] Section 514(a) of ERISA provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

> that may "*relate to*" *an ERISA plan*, but is not a basis for federal jurisdiction.

Speciale, 147 F.3d at 615 (emphasis added).

As it argued in *Speciale*, the Wal-Mart Committee argues again that complete preemption under § 502(a) has occurred. However, following the Seventh Circuit's rationale in *Speciale* as explained below, the court finds this is not a case of complete preemption under § 502(a) but is rather merely conflict preemption under § 514(a). Therefore, there is no basis for federal jurisdiction here.

In *Speciale*, the plaintiff was an employee of Wal-Mart and a participant in Wal-Mart Stores, Inc. Associates Health and Welfare Plan. As a result of an automobile accident, she sustained injuries, and the Plan paid $54,051.07 toward the costs of her medical care. The plaintiff filed a personal injury action against the driver of the other car in Illinois state court and accepted $45,000 in settlement. The plaintiff then filed a motion to adjudicate liens in state court, listing sixteen providers, including Wal-Mart, who were asserting claims against the settlement fund.[4] Wal-Mart, acting independently, removed the action to the federal district court under 28 U.S.C. § 1441(b), maintaining that because the Plan arose

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[4] The plaintiff in *Speciale* filed her motion to adjudicate liens in state court after she settled her case. Here, Varco filed her motion to adjudicate liens in state court while still considering a settlement offer. However, this distinction in timing is irrelevant to the outcome of this case. As in *Speciale*, there is no evidence or allegation that the Wal-Mart Committee's subrogation right has been questioned. *See Speciale*, 147 F.3d at 617. All that remains here is a determination on the apportionment of the funds under state law. *See id.*

under and was governed by ERISA, the plaintiff's motion to adjudicate was completely preempted. The district court concluded that the claim was preempted under § 502(a) of ERISA, 29 U.S.C. § 1132(a),and entered judgment in favor of Wal-Mart. On appeal, the plaintiff argued that the district court did not have federal jurisdiction because the motion to adjudicate fell under her well-pleaded complaint which alleged a state law claim of personal injury, neither of which presented a federal question nor permitted complete preemption under ERISA. The Seventh Circuit agreed with the plaintiff and reversed and remanded the case to the district court with directions to remand the case to state court for lack of federal subject matter jurisdiction. *Id.* at 617.

In its decision, the Seventh Circuit held that there was no federal subject matter jurisdiction because the plaintiff's request for apportionment could not be recharacterized as a suit to enforce her rights under the terms of the Plan, and therefore it was not completely preempted under § 502(a). *Id.* at 616. The court explicitly held that "in a state cause of action where there are adversarial claims to a settlement fund between an ERISA plan subrogation claim and other statutory medical liens, there is no preemption under § 502(a) and the allocation of the funds is a matter for the state court under which original jurisdiction arose." *Id.* In so finding, the court reasoned that although the plaintiff was entitled to bring a claim under the Wal-Mart plan, "her claim of personal injury was not a cause of action that falls within the scope of an ERISA provision nor did her state law claim require resolution of an interpretation of the contract governed by federal law." *Id.* at 615.

In its reasoning, the court in *Speciale* discussed *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997), another

nearly identical scenario to the immediate case.[5] As discussed in *Speciale*, in *Blackburn*, two beneficiaries of an ERISA plan were injured in an automobile accident. *Speciale*, 147 F.3d at 616 *(citing Blackburn,* 115 F.3d at 494*)*. They filed suit in an Illinois court against the driver of the other car and accepted a settlement. *Id.* Two parties had claims against the settlement fund, the Blackburns' attorney and their ERISA welfare benefit plan. *Id.* The Blackburns filed a petition in state court to apportion the fund. *Id.* The fund administrator removed the case to federal court under 28 U.S.C. § 1441(b). *Id.* The Seventh Circuit "stated most emphatically that removal under ERISA preemption was improper based upon the well-pleaded complaint rule and the determination that 'not even the most expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of

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[5] The Wal-Mart Committee attempts to distinguish *Blackburn* and *Speciale* by arguing that these two cases involved removal under § 1441(b), not § 1441(c). Section 1441(c) of Title 28 permits removal "whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action[.]" The Seventh Circuit has stated that "claims are not 'separate and independent' if the wrongs arise from an interlocked series of transactions, i.e., they substantially derive from the same facts," even if more than one wrong is involved. *Lewis v. Louisville & Nashville R.R. Co.,* 758 F.2d 219, 221 (7th Cir. 1985). Here, the court finds that Varco's motion to adjudicate liens is not sufficiently "separate and independent" from the original claim as required for removal under Section 1441(c). Therefore, removal under § 1441(c) is improper in this case, and the Wal-Mart Committee cannot distinguish *Blackburn* and *Speciale* on this basis. In addition, removal under diversity jurisdiction and § 1441(a) would have been impossible here because the amount in controversy is far below the $75,000 required for diversity jurisdiction. *See Speciale,* 147 F.3d at 616 n.5.

a plan." *Speciale,* 147 F.3d at 616 (quoting *Blackburn,* 115 F.3d at 494).

Here, as in *Speciale* and *Blackburn*, the element of § 1331 "federal question" jurisdiction arose for the first time in non-defendant Wal-Mart Committee's notice of removal. *Speciale,* 147 F.3d at 616. As in both those cases, the Wal-Mart Committee removed the motion to adjudicate under 28 U.S.C. § 1441(b), which allows removal from state court to federal court for "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States."[6] As

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[6] As the Seventh Circuit noted in *Speciale*, although the issue of the Wal-Mart Committee's removal under § 1441(b) was not raised by Varco, it is necessary to clarify the fact that the Wal-Mart Committee's removal was procedurally defective. *See Speciale,* 147 F.3d at 616 n.4. A prerequisite to removal under § 1441(b) is § 1441(a), which allows for removal to a district court, "by the defendant or the defendants...." 28 U.S.C. § 1441(a). Unless all defendants consent to removal, or the petition explains why the other defendants have not consented, the removal is considered defective. *Speciale,* 147 F.3d at 616 n.4. Here, the Wal-Mart Committee argues that Varco's motion to adjudicate liens could have been brought as a separate action, and therefore this claim was removable as a separate and independent claim under 28 U.S.C. § 1441(c), which does not require all defendants to join in the notice of removal. *Id.* However, as explained earlier, removal of this case under § 1441(c) is improper because Varco's motion to adjudicate liens is not sufficiently "separate and independent" from the original claim as required for removal under Section 1441(c). Therefore, § 1441(c) is inapplicable and the Wal-Mart Committee needed the consent of all defendants to remove this case. As the Seventh Circuit articulated in *Speciale*,

> Wal-mart, although not a 'defendant' per se, but if viewed as a type of 'intervening defendant,' failed to comply with

the Seventh Circuit stated in both *Speciale* and *Blackburn*, a tort suit based on a personal injury claim arising from an automobile accident does not arise under the Constitution, treaties, or laws of the United States. *Speciale*, 147 F.3d at 616 (citing *Blackburn*, 115 F.3d at 494). Therefore, here, as in *Speciale* and *Blackburn*, "the petition to apportion the fund invoked the ancillary jurisdiction of the state court and was part of that original, non-removable action." *See id.* Therefore, Varco's motion to adjudicate does not present a federal question under 28 U.S.C. § 1331, and her case was improperly removed to federal court under 28 U.S.C. § 1441(b).

Further, *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999), does not alter this conclusion. In *Gauf*, the defendant, Patricia Gauf, was injured in an automobile accident. *Gauf*, 188 F.3d at 768. As an employee of Wal-Mart, she was covered under Wal-Mart's Associates' Health and Welfare Plan. The Plan reimbursed Gauf for her medical treatment on the condition that Gauf reimburse the plan to the extent of any judgment or settlement received relating to the accident. In a separate tort action against the driver of the other automobile involved in the accident, Gauf received a verdict in her favor and collected $36,000. Subsequently, the plaintiff, the Administrative Committee of the Associates' Health and Welfare Plan, filed a separate lawsuit in federal court, seeking an order compelling Gauf to reimburse the

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> procedural requirements. Wal-Mart was one of [several] lienholders named in the plaintiff's motion to adjudicate. However, Wal-Mart filed the removal notice independently, without the consent or cooperation of the remaining ... lienholders. Removal, therefore, was not procedurally appropriate.
>
> *Speciale*, 147 F.3d at 616 n.4.

Plan for the benefits it had paid to her relating to the accident. The plaintiff based its claim on the ERISA governed plan. *Id.* The court in *Gauf* found that there was federal jurisdiction over the plaintiff's action because the complaint stated a claim under ERISA's civil enforcement provision, § 502(a)(3). *Id.* at 771. In so finding, *Gauf* distinguished its decision from *Speciale* and *Blackburn*. Specifically, the court stated,

> *Blackburn* and *Speciale* do not govern the case that we have before us today. As we already noted, unlike the situations in those cases, the complaint here states a claim under ERISA § 502(a)(3), and is therefore within our jurisdiction. In *Blackburn* and *Speciale*, there were no such federal claims under ERISA § 502(a)(3) or otherwise; the claims removed were state claims (a tort action and a motion to adjudicate liens).

Id. at 771. Here, unlike *Gauf*, and like *Blackburn* and *Speciale*, the Wal-Mart Committee invokes § 502(a)(3) of ERISA as a defense to plaintiff's motion. Therefore, federal jurisdiction does not govern that defense.[7]

In sum, this case was improperly removed to federal court, and the court grants Varco's motion to remand this case to the Circuit Court of Cook County.

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[7] In its response in opposition to Varco's motion to remand, the Wal-Mart Committee notes that, "out of an abundance of caution," it has filed an independent action in federal court against Varco under ERISA to enforce the terms of the Plan. (Resp. at 2 n.2.) In contrast to the current case, there may be federal jurisdiction over the Wal-Mart Committee's independent action if the complaint states a claim under ERISA's civil enforcement provision, § 502(a)(3). *See Gauf*, 188 F.3d at 771.

CONCLUSION

For the foregoing reasons, the court grants Varco's motion to remand this case to the Circuit Court of Cook County, Law Division.

Date: NOV 15 2001

APPENDIX H

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

[Filed Sept. 19, 2001]

Clara Varco & Kimberly Soria, Plaintiffs,	)	
Vs.	)	No: 00 L 12201 E
Kristopher Lapsis, Defendant.	)	

MOTION TO ADJUDICATE LIENS

NOW COMES the plaintiffs, Clara Varco and Kimberly Soria, by their attorney, Laurence J. Dunford, and move this Court adjudicate the liens of the health insurance carriers, medical providers and medical payments insurer and, in support thereof, state as follows:

1. That the plaintiffs Clara Varco and Kim Soria were involved in an auto collision out of which this matter arises.

2. That the defendant, Kristopher Lapis, has a policy which provides coverage with limits of $20,000 per person and $40,000 per accident.

3. That the carrier has offered its limits of liability.

4. The All-State Insurance has a policy of Insurance which provides $5,000 medical payments coverage and that All-State has paid out its full coverage for each plaintiff(total $10,000.00)

5. That Clara Varco was an insured under a policy which was issued by Blue Cross and Blue Shield of Illinois and that they paid $34,034.55 on her behalf.

6. That Advance Physician's Group has an outstanding bill of $2,405.05 for services rendered to Ms. Varco.

7. That Kim Soria was covered by Aetna Insurance Company for health coverage and Aetna Has paid the sum of $5090.80.

8. That Advance Physician's Group has an outstanding bill of $1,893.44 for services rendered to Ms. Sofia.

9. That Laurence J. Dunford has expended $1,202.434 expenses which are common to each plaintiff and for investigation and filing fees which should be split equally between the plaintiffs and the lien holders. Additionally, Laurence J. Dunford has incurred $204.30 expenses for records of Kim Soria and $ $174.30 for Clara Varco records.

10. That Laurence J. Dunford is entitled to fees of 1/3 of the recovery under the common fund doctrine established by the case of *Baier v. State Farm.*

11. That the Statutes of the state of Illinois provides that liens cannot exceed 1/3 of the recovery.(6333.33 each plaintiff)

12. That the offer of $20,000.00 for each individual was secured through the efforts of Laurence J. Dunford and the liens should be reduced by 1/3.

13. That a fair and equitable award to the lien holders would be a pro-rata share of the 1/3.

14. That as to Clara Varco, the total liens claimed are $41,538.60 by the three lien claimants (BCS-$34,034.55 [81.9%], All-State-$5,000[12.0%] and Advance Physicians has balance of $2,504.05 [6.1%])

15. That as to Kim Soria, the total liens claims are $11,984.24 by the three lien claimants (Aetna-$5,090.80[42.5%], All-State- $5,000.00[41.7%] and Advance Physicians has balance of $1,893.44[15.8%].

16. That there is $5,845.37 available for distribution (6333.33-400.81[1/3 common expenses]-87.15[1/2 of the medical record expense] from the settlement of Clara Varco.

17. That as to Clara Varco's settlement, the $5,845.37 should be distributed $4,787.36 to Blue Cross and Shield ($ 5845.37 * 81.9%); $701.44 to AllState ($ 5845.37 * 12.0%) and $ 356.57 to Advance Physicians Group ($ 5845.37 * 6.1%).

18. That there is $5,830.37 available for distribution (6333.33-400.81[1/3 common expenses]-102.15[1/2 of the medical record expense] from the settlement of Kim Soria.

19. That as to the settlement of Kim Soria, the $5,830.37 should be distributed $2,477.91 to Aetna Insurance ($5830.37 * 42.5%); $2,431.26 to All-State ($5830.37 * 41.7%) and $921.20 to Advance Physicians Group ($5830.37 * 15.8%).

Wherefore, Kimberly Soria and Clara Varco, by their attorney, Laurence J. Dunford, pray this court adjudicate the liens of the medical providers and the healthcare providers in accordance with the above calculations.

/s/ Laurence J. Dunford
Attorney for Plaintiff

Attorney Code: 20186
Laurence J. Dunford
Attorney for Plaintiff
39 South LaSalle Street Suite 610
Chicago, Illinois 60603
312-782-7482

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Filed October 4, 2001]

CLARA VARCO & KIMBERLY SORIA, Plaintiffs,	)
v.	)
KRISTOPHER LAPSIS, Defendant.	)

DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' NOTICE OF REMOVAL

Defendant, Blue Cross Blue Shield of Illinois ("Defendant"), hereby removes this action to this Court pursuant to 28 U.S.C. §§ 144l(a), (b), and (c) and, in support thereof, states as follows:

1. On or about September 27, 200t, Defendant received a copy of a Motion to Adjudicate Liens, Notice of Motion, mad an Amended Motion to Adjudicate Liens in an action styled *Clara Varco & Kimberly Soria, Plaintiffs vs. Kristopher Lapsis,* Defendant, Case No. 00 L 12201 E pending in the Circuit Court of Cook County, Illinois, County

Department, Law Division. The Petition seeks an order reducing the lien held by the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan"). Defendant is the third-party administrator for the Plan. The Plan, which is covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), provides for full reimbursement where participants are injured because of third parties, receive benefits because of those injuries, and make a second recovery, for the same injuries, from a third party. A copy of the foregoing document is attached hereto as Exhibit A hereto and constitutes all pleadings, process, and other documents served upon Defendant in this action. This document was the initial paper served upon Defendant setting forth the claim upon which such action or procedure is based.

2. This action is removable pursuant to 28 U.S.C. 1331 and 1441. Plaintiff Clara Varco asserts claims which raise substantial questions of federal law and which arise out of federal law. Plaintiff Varco seeks to have the state court determine enforceability of the reimbursement provision of a self- funded, ERISA-governed, employee welfare benefit plan against the monies Plaintiff has received from the third parties-responsible for her injuries. Plaintiff's claims relate to benefits that Plaintiff received under the Plan, an employee benefit plan as defined and described in 29 U.S.C. § 1001(1) and § 1003(a). Plaintiff received benefits under the Plan in the amount of $34,034.55.

3. Plaintiff Varco's claims further relate to the employee benefit plan within the meaning of ERISA, 29 U.S.C. § 1001; *et seq.*, and are preempted and superseded by 29 U.S.C. § 1144(a).

4. This action is removable pursuant to the complete preemption doctrine without regard to the well-pleaded

complaint rule. *Metropolitan Life Insurance Co., v. Taylor,* 481 U.S. 58 (1987).

5. This Court has original jurisdiction of ERISA actions under 29 U.S.C. § 1132(e). This action is founded on claims or rights arising under the laws of the United States in that it is based upon and requires the application of ERISA, 29 U.S.C. § 1144(a). Removal jurisdiction exists under 28 U.S.C. § 1441 (a), (b), and (c).

6. The reimbursement provision applicable to Plaintiff requires 100% reimbursement and specifically establishes that the Plan is not responsible for paying Plaintiffs' attorney's fees and costs. A true and correct copy of the reimbursement provision is attached hereto as Exhibit B.

7. Resolution of Plaintiff Varco's claim for relief requires the Court to construe the terms of an ERISA plan. Specifically, the Court must construe the reimbursement provision contained in the Plan to determine the parties' rights in this action.

8. Because the Plan specifically states that Plaintiff Varco's attorney's fees and costs are not the responsibility of the Plan, the Illinois Common Fund Doctrine is preempted by ERISA in this action and, thus, removal of this action is proper. *See McCotter v. Longo,* No. 95C5985, 1997 U.S. Dist. LEXIS 15357 (N.D. Ill. Sept. 30, 1997) (copy attached hereto as Exhibit C).

9. Plaintiff Varco's claim for a declaration of rights under the Plan could have been brought as a separate action. Plaintiff Varco's claim against Defendant is therefore removable as a "separate and independent claim." 28 U.S.C.

§ 1441(c); *Bond v. Reliance Insurance Co.*, 433 F. Supp. 243, 248 (D. N.J. 1977) (claim is separate and distinct if the claim could have been the subject of an independent action by itself, and without being joined or consolidated with others.). Therefore, the entire action is removable pursuant to 28 U.S.C. § 1441(c). Because removal is proper under 28 U.S.C. § 1441 (c), not all defendants are required to join in this Notice of Removal. *Thomas v. Shelton,* 740 F.2d 478,483 (7th Cir. 1984).

10. This Notice of Removal was timely filed pursuant to 28 U.S.C. § 1446(b), having been filed within thirty (30) days after service of Exhibit A.

11. Venue is proper in this Court.

12. Pursuant to 28 U.S.C. § 1446(d), Defendant will promptly give written notice of the removal of this action to all parties and will file a copy of this Notice with the state court.

WHEREFORE, Defendant removes this action to this Court.

Respectfully submitted,
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_____

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Supreme Court, U.S.
FILED
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No. 03-959

In The
Supreme Court of the United States

CLARA VARCO,

Petitioner,

v.

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

a) Does the decision of the Seventh Circuit panel below conflict with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002)?

b) Does the decision of the Seventh Circuit panel below conflict with the Ninth Circuit's decision in *Westaff, Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111(2003)?

c) Does the decision of the Seventh Circuit panel below conflict with other decisions of the Seventh Circuit?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan states that it is the fiduciary of the Associates' Health and Welfare Plan, which is sponsored by Wal-Mart Stores, Inc. Wal-Mart Stores, Inc. is a publicly held Arkansas corporation, and there are no parent corporations or publicly held companies owning 10% of its stock.

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OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit (*See* Varco Petition, App. B) was entered on July 29, 2003, and is reported at 338 F.3d 680 (7th Cir. 2003). The order denying petition for rehearing *en banc* (*See* Varco Petition, App. A) was entered by the Seventh Circuit Court of Appeals on August 22, 2003, and is reported at 2003 U.S. App. LEXIS 17772 (7th Cir. 2002). The opinion of the United States District Court for the Northern District of Illinois granting summary judgment to respondent (*See* Varco Petition, App. D) was issued on October 2, 2002, and it is reported at 2002 U.S. Dist. LEXIS 18933 (N.D. Ill. 2002). The order of the United States District Court for the Northern District of Illinois, denying petitioner's motion to dismiss for lack of subject matter jurisdiction (*See* Varco Petition, App. E at 50-52) was entered on January 14, 2002, and is reported at 2002 U.S. Dist. LEXIS 530 (N.D. Ill. 2002).

STATEMENT OF JURISDICTION

Petitioner invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The operative statutory provision, § 502(a)(3) of the Employee Retirement Income Security Act of 1974, found at 29 U.S.C. § 1132(a)(3), provides:

(A) Persons empowered to bring a civil action. A civil action may be brought –

. . .

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

STATEMENT OF THE CASE

Clara Varco was injured in an automobile accident. At the time of her accident, Varco was a participant in the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan"). Pursuant to its terms, the Plan paid $18,865.72 in benefits on behalf of Varco as a result of those injuries. While the Plan provides that Varco, as a participant, is entitled to receive benefits, the Plan does not allow her to enjoy a "double recovery" of benefits for her injuries – one payment from the Plan and one from the other parties Varco sued in an Illinois state court. Instead, the Plan requires that Varco reimburse the Plan to the extent of benefits paid when she makes a recovery from another party.

Varco filed an action in an Illinois state court seeking recovery for her injuries. Upon recovering a total of $100,000.00 from the responsible third-party and her underinsured motorist carrier, Varco refused to fully reimburse the Plan.

Instead, her attorney, Laurence Dunford, told the Committee's counsel that he was disbursing the funds to Ms. Varco. The Plan filed this action, alleging federal question subject matter jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1332, and § 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132. (*See* Varco Petition, App. F). The Plan sought to enforce its rights by way of injunction, declaratory judgment, constructive trust, or restitution. The Committee obtained a temporary restraining order and preliminary injunction prohibiting Varco and Dunford from disbursing the funds. Despite the fact that the district court had taken control of the funds, Dunford attempted to return to state court to have that court determine the Plan's rights. The Plan sought, and obtained, an injunction staying the state court action pending a final determination in the court below.

Varco filed a motion to dismiss, for among other reasons, lack of federal subject matter jurisdiction. This motion was denied on January 14, 2002. (*See* Varco Petition, App. E at 47a-49a). Varco filed an interlocutory appeal. (*See* Varco Petition, App. B at 3a). The parties thereafter filed cross motions for summary judgment.

On October 2, 2002, the district court granted the Committee's motion for summary judgment, but held that the Illinois Common Fund Doctrine applied to the Committee's reimbursement amount despite the fact that the plan provision specifically provides that all attorney's fees are the responsibility of the participant. The order granting summary judgment found that the plan was entitled to reimbursement pursuant to the terms of the Plan, but that in accordance with the Common Fund Doctrine, Varco was entitled to credits for the plan's pro-rata share of attorney's

fees and cost attributable to the recovery. (*See* Varco Petition, App. D).

Varco filed an interlocutory appeal of the decision issuing a preliminary injunction, and denying her motion to dismiss for lack of subject matter jurisdiction. (*See* Varco Petition, App. B at 6a). After the district court granted summary judgment, the Plan appealed the finding that the Illinois Common Fund Doctrine applied to the Plan's claim for reimbursement. These appeals were consolidated. (*See* Varco Petition, App. B at 8a). The panel below, in an opinion issued by the Seventh Circuit Court of Appeals, affirmed the district court's denial of Varco's motion to dismiss, and reversed the trial court's finding that the Illinois Common Fund Doctrine applied to an ERISA plan's suit to enforce its right to reimbursement.

REASONS FOR DENYING REVIEW

I. The Seventh Circuit's decision does not conflict with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson.*

A. In *Great-West Life*, this Court found that federal courts can preside over an ERISA plan's claim for reimbursement when the plan seeks equitable relief under 29 U.S.C. § 1132(a)(3).

Varco misconstrues this Court's holding in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Varco asserts that this Court found that § 502(a)(3) of ERISA does not ever authorize the federal courts to preside over an ERISA plan's claim for reimbursement. (Varco Petition, pp. 7-8). That is not what this Court held

in *Great-West Life*. This Court specifically held that a plaintiff, pursuant to 29 U.S.C. § 1132(a)(3), can seek equitable restitution in the form of a constructive trust when: (1) identifiable monies are being held by a defendant; and (2) the plaintiff is entitled to the monies. *Great-West Life*, 534 U.S. at 213. Under Varco's interpretation of *Great-West Life,* all claims brought by an ERISA plan seeking reimbursement should be characterized as legal claims and should never be actionable under 29 U.S.C. § 1132(a)(3).

In *Great-West Life,* Plaintiff Great-West asked this Court to recognize the rights of ERISA plans and their fiduciaries to file suit in federal court to enforce reimbursement provisions. Plaintiff Great-West argued that its suit was authorized by § 502(a)(3)(B) because it sought restitution, which they characterized as equitable relief. *Great-West Life*, 534 U.S. at 212. This Court noted that not all restitution is equitable and clarified the distinction between legal and equitable restitution for purposes of ERISA. *Id.* at 213-14. The court found that restitution is legal when the plaintiff's claim seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* at 213. The court further noted that:

> In contrast, **a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. [citations omitted]. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give**

> **a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner**.
>
> But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust or an equitable lien upon other property of the [defendant]." *Restatement of Restitution*, *supra*, § 215, Comment *a*, at 867. Thus, **for restitution to lie in equity, the action generally must seek** not to impose personal liability on the defendant, but **to restore to the plaintiff particular funds or property in the defendant's possession**.

Id. at 213. (Emphasis added).

Therefore, this Court did not find that § 502(a)(3) of ERISA never authorizes federal courts to preside over an ERISA plan's claim for reimbursement, but rather found that such an action can be brought under § 502(a)(3), so long as the monies over which the plan fiduciary seeks restitution or a constructive trust are being held by the defendant in the federal court lawsuit and in good conscience belong to the plaintiff.

B. The Seventh Circuit's decision clearly follows this Court's holding in *Great-West Life*.

Varco alleges that the decision below ignores the precedent set by this Court in *Great-West Life*. (Varco Petition, p. 7). This allegation is false, as a review of the decision below shows that the Seventh Circuit not only discussed the *Great-West Life* decision but relied upon it in

forming its decision. *See Admin. Comm. of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco*, 338 F.3d 680, 686-88 (7th Cir. 2003). The court below specifically noted that "[i]n *Great-West Life*, the Court considered a case with facts similar to this case and therefore bears scrutiny." *Id.* at 686.

In reaching its decision, the court below noted that this case was unlike *Great-West Life*, because the funds at issue here "are identifiable, have not been dissipated, and are still in the control of a Plan participant." *Id.* at 687. Relying on *Great-West Life's* reasoning that "plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession," the court below found that the Committee's reimbursement action is equitable because the funds sought are identifiable; in the control of Varco; and the Committee is rightfully entitled to the monies under the terms of the Plan. *Id.* at 688. Therefore, the court below held that the Committee's claim was equitable under § 502(a)(3)(B) of ERISA, and that the district court properly exercised federal question subject matter jurisdiction. *Id.* at 688.

Federal courts throughout the United States have routinely held, based on this Court's decision in *Great-West Life*, that monetary payments in the form of equitable restitution are appropriate where the disputed funds are identifiable and traceable and in the control of a defendant in the action. *See Honolulu Joint Apprenticeship and Training Committee of United Assoc. Local Union No. 675 v. Foster,* 332 F.3d 1234, 1238 (9th Cir. 2003) (following *Great-West Life* and holding that equitable restitution in

the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough, P.C.*, No. 03-10195, 2003 U.S. App. LEXIS, at *18 (5th Cir. Dec. 17, 2003) (finding that the imposition of a constructive trust over specifically identifiable settlement funds was equitable in nature and permitted by § 502(a)(3)) (copy attached hereto as App. 1-28); *Forsling v. J.J. Keller & Associates, Inc.*, 241 F. Supp. 2d 915 (E.D. Wis. 2003) (applying *Great-West Life* and allowing equitable relief where the funds at issue were identifiable; had not been dissipated; were still in the control of the insurer; and in good conscience belonged to the sponsor pursuant to the subrogation provisions of its plan); *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 48 (D. D.C. 2003) (noting that the claim for restitution is equitable because the funds are in the possession of the defendant); *Wellmark, Inc. v. DeGuara*, 257 F. Supp. 2d 1209 (S.D. Iowa 2003) (allowing equitable relief under *Great-West Life* where a defendant had control of identifiable funds); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376 (M.D. Ga. 2002) (finding that the disputed funds were identifiable and traceable where the covered person's attorney was holding funds; thus, the plan was entitled to equitable relief); *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt,* 211 F. Supp. 2d 812 (N.D. Tex. 2002) (holding that the disputed funds in the participant's attorney's trust account were traceable and identifiable to the defendant and, therefore, the plan was entitled to equitable relief); *Bauer v. Camrud, Maddock, Olsen & Larson, Ltd.,* Nos. A3-00-161, A3-02-27, 2002 U.S. Dist. LEXIS 7246 (D. N.D. Apr. 22, 2002) (ruling that an ERISA plan fiduciary may pursue a reimbursement claim in the form of a constructive trust where the

funds at issue are preserved in an attorney trust account) (copy attached hereto as App. 29-36); *Allison v. Wellmark, Inc.*, No. C00-3015-MWB, 2002 U.S. Dist. LEXIS 24168 (N.D. Iowa Oct. 15, 2002) (concluding that a constructive trust is among the remedies available under § 1132(a)(3), as a means by which to compel restitution to an ERISA plan) (copy attached hereto as App. 37-57).

C. A claim for equitable restitution will not always lie.

Varco asserts that since all monies distributed to personal injury plaintiffs pass through the client trust fund account of their attorneys, a claim for equitable restitution will always lie and federal courts will be flooded with this type of litigation. (Varco Petition, pp. 10-11). This assertion is unfounded. As this Court found in *Great-West Life*, a claim for equitable restitution did not lie because defendants no longer possessed the funds. *Great-West Life*, 534 U.S. at 214. In *Great-West Life*, the funds from the settlement had been disbursed by two checks, with "one made payable to the Special Needs Trust and the other to respondents' attorney (who, after deducting his own fees and costs, placed the remaining funds in a client trust account from which he tendered checks to respondents' other creditors, Great-West and Medi-Cal)." *Id.*

Additionally, circuit courts have also dismissed claims for restitution because the defendant was not in possession of the funds. *See Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-322 (2d Cir. 2003) (holding that the plaintiffs did not make out a claim under restitution because the monies sought by them were never in the possession of the defendant); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445

(5th Cir. 2002) (finding that there was no claim for restitution because the settlement proceeds were not in defendants' possession). Therefore, Varco's assertion that a claim for equitable restitution will always lie is without merit.

II. The decision below does not conflict with other circuit court decisions.

Varco asserts that the decision below creates an irreconcilable conflict among the circuits, especially with the Ninth Circuit's holding in *Westaff Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003). (Varco Petition, p. 11).

Varco alleges that the facts in *Westaff* are identical to the present case. (Varco Petition, p. 13). This is incorrect, because there is an important distinction between these two cases. The plaintiff in *Westaff* did initiate an action in federal court seeking a determination of the Plan's rights under ERISA, but the action was filed *before* this Court decided *Great-West Life* and *only* sought declaratory relief and specific performance. (A true and correct copy of Westaff's complaint is attached hereto as App. 58-61). This Court stated in *Great-West Life* that "specific performance . . . was not typically available in equity." *Great-West Life*, 534 U.S. at 211. Unlike the plaintiff in *Westaff*, the Committee here specifically sought restitution when it filed its action. *See Varco*, 338 F.3d at 683.

Westaff could not have realized the importance of specifically seeking restitution in the form of a constructive trust, which is the form of "equitable relief" that this Court recognized in *Great-West Life* is typically available in equity, even if the party seeks a monetary payment, so long as the funds are "identifiable" and the party seeking

the funds is entitled to them. *See Great-West Life*, 534 U.S. at 213. Thus, based on this Court's decision in *Great-West Life*, an important distinction exists among these cases, since the Committee's complaint does not suffer from the defect present in Westaff's complaint.[1]

Since the *Westaff* court did not address the issue of asserting restitution, it left intact the availability of restitution as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). Therefore, the *Westaff* decision does not present an irreconcilable conflict with the panel below, as these cases dealt with different types of relief.

Even if *Westaff* did present a conflict, Varco fails to mention that the Ninth Circuit later clarified its holding in *Westaff* by finding that equitable restitution in the form of a monetary payment is appropriate where, as here, "identifiable and traceable" funds are in the control of the defendant in the action. *See Honolulu Joint Apprenticeship and Training Comm. of United Assoc. Local Union No. 675 v. Foster*, 332 F.3d 1234, 1238 (9th Cir. 2003). In *Honolulu*, the Ninth Circuit stated:

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[1] The result in *Westaff* is much like *Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Mui Trong*, No. 01-873, 2002 U.S. Dist. LEXIS 1697 (D. Minn. Jan. 31, 2002) (copy attached hereto as App. 62-70). There, the Court held that equitable relief was not available under ERISA because the plan's complaint did not seek the type of equitable relief, restitution, that the Supreme Court in *Knudson* held was typically available in equity. *See also Pullins v. Associated Material Handling Inds., Inc.*, No. 1:03-cv-0099-JDT-WTL, 2003 U.S. Dist. LEXIS 12439, at * 7-8 (S.D. Ind. May 20, 2003) (noting that one of the reasons this Court concluded that Great-West sought legal restitution was because the petitioners did not seek to impose a constructive trust or equitable lien on particular property) (copy attached hereto as App. 71-78).

> Thus, equitable restitution is available where the specific *res* or funds can be identified and attached by equitable lien or constructive trust, but not where the plaintiff seeks to impose general personal liability as a remedy for the defendant's monetary obligations.

Id. at 1238.[2]

In *Honolulu*, the union sought reimbursement for monies it paid to a plan participant for the costs incurred for his training in the plumbing and pipefitting industry. *Id.* at 1236. While the court found that the union was seeking legal restitution not available under § 1132(a)(3) because the action sought to impose personal liability on the participant, the court noted that equitable restitution is available when there is an identifiable res, *i.e.* when money or property belonging to the plaintiff can clearly be traced to particular funds or property in the defendant's possession. *Id.* at 1238.

Thus, both circuits follow this Court's decision in *Great-West Life*, and hold that equitable restitution in the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant. Therefore, there is no circuit split, and it is unnecessary for this Court to grant certiorari.

Varco further alleges that the decision below conflicts with the decisions of other circuits, noting that other circuits have adhered to this Court's admonition to look past the label attached to a suit filed under § 502(a)(3),

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[2] Unlike *Westaff*, *Honolulu* was decided after this Court's decision in *Great-West Life*.

and determine whether the claimant is seeking to impose personal liability for traditionally legal remedies. (Varco Petition, p. 14). While this is true, Varco fails to mention that in doing so, these circuits further analyze whether the claim for restitution under ERISA is an equitable or legal claim. Consistent with this Court's decision in *Great-West Life*, when the funds are still in the possession of the defendant, circuit courts find that the claim is one for equitable relief under ERISA. *See Honolulu,* 332 F.3d at 1237-38 (following *Great-West Life* and holding that equitable restitution in the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant); *Bombardier*, 2003 U.S. App. LEXIS, at *18 (finding that the imposition of a constructive trust over specifically identifiable settlement funds was equitable in nature and permitted by § 502(a)(3)); *Primax Recoveries, Inc. v. Young*, No. 02-2115, 2003 U.S. App. LEXIS 25786, at *4 (4th Cir. Dec. 18, 2003) (holding that because the funds at issue were within the defendant's possession, plaintiff could properly proceed under ERISA) (copy attached hereto as App. 79-83). *Cf. Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-322 (2nd Cir. 2003) (finding that the plaintiffs did not make out a claim under restitution because the monies sought by them were never in the possession of the defendant); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002) (holding that the relief sought did not constitute restitution because the settlement proceeds were not in defendants' possession).

Thus, like the court below, other circuits also adhere to this Court's decision in *Great-West Life*, and analyze whether the claim is one for legal or equitable relief in determining whether an action can be maintained under ERISA. When the funds are in the possession of the

defendant, these courts conclude, as did the court below, that the claim is an equitable claim under ERISA. Therefore, this Court should deny review, because no inconsistent precedent exists among the circuit courts. Hence, there is nothing for this Court to review.

III. The decision below does not conflict with other decisions within the Seventh Circuit.

Varco alleges that the decision below creates an intra-circuit conflict with the Seventh Circuit's decision in *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544 (7th Cir. 2003). (Varco Petition, pp. 15-16). Varco is incorrect, because he unquestionably misstates the court's holding in *Sevilla*.

Varco asserts that in *Sevilla*, the Seventh Circuit "determined that an ERISA fiduciary's claim for reimbursement under the terms of the plan, no matter how drafted, is a legal claim for breach of contract, and thus not within the federal subject matter jurisdiction granted under 29 U.S.C. § 502(a)(3)."[3] (Varco Petition, p. 16). This is an incorrect summation of the Seventh Circuit's holding in *Sevilla*. In *Sevilla*, the Seventh Circuit did not conclude that an ERISA fiduciary's claim for reimbursement is *always* a legal claim for breach of contract, and in fact, specifically noted that the Supreme Court made clear in *Great-West Life* that an ERISA fiduciary cannot sue a plan participant or beneficiary under ERISA *unless* it is seeking equitable relief, which can include the imposition of a

[3] Respondent assumes that Varco meant to say under 29 U.S.C. § 1132(a)(3).

constructive trust on money claimed to be wrongfully withheld from the plaintiff. *Id.* at 547.

In *Sevilla*, Primax instituted a declaratory judgment action seeking entitlement to a declaration of its right under ERISA to reimbursement out of recoveries against third parties. *Sevilla*, 324 F.3d at 547. Applying *Great-West Life*, the court conducted an analysis to determine whether Primax's claim was an equitable claim available under ERISA. *Id.*

Primax argued that the money it sought should be thought of as a fund, a *res*, held by the third party's insurer and claimed by Primax but wrongfully withheld because of the lawyer's refusal to endorse the check. *Id.* at 548. The court disagreed because the funds were not in the possession of the defendant. *Id.* The court stated, "[s]o to this day the fund remains in the hands of the insurer, who is not a defendant. You can impose a constructive trust only on a defendant." *Id.* Thus, in *Sevilla*, there were no funds in the possession of the defendant as required by *Great-West Life* to assert a claim for equitable restitution under ERISA.

In both cases, the Seventh Circuit utilized the same analysis. Different results were reached because in *Sevilla*, the defendant did not have possession of the funds, while in the case below, Varco did have possession of the funds. Thus, there is no intra-circuit split within the Seventh Circuit.

Additionally, the decision below is in accord with other Seventh Circuit precedent. For example, in *Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000), the Seventh Circuit found that a plan administrator's suit for a constructive trust over

settlement funds, presumed to be held in escrow by the participant's attorney, "nestles comfortably" within ERISA's concept of equity.

Furthermore, the decision below is in accord with the district court decisions within the Seventh Circuit. For example, in *Forsling v. J.J. Keller & Associates, Inc.*, 241 F. Supp. 2d 915 (E.D. Wis. 2003), a Wisconsin district court, applying *Great-West Life*, found that a plan sponsor could maintain an equitable claim under § 502(a)(3). The court specifically stated that "*Knudson*, by its own language, did not bar plan administrators from bringing an action to obtain reimbursement for benefits they paid." *Id.* at 919. The court also noted that the mere fact the plan administrator was seeking money does not *ipso facto* turn the action into a legal action for damages, as the plaintiff had argued. *Id.* The *Forsling* court concluded that there was an equitable claim and awarded a constructive trust over the funds, because the funds were identifiable; had not been dissipated; were still in control of a defendant; and in good conscience belonged to the plan administrator pursuant to the subrogation provision of the Plan. *Id.*

There are also district court decisions, applying the same analysis as that applied by the court below, who have concluded that the action was based in law and not equity. In *Leipzig v. AIG Life Ins. Co.*, 257 F. Supp. 2d 1152 (N.D. Ill. 2003), an Illinois district court found that the insurer's restitution claim was not actionable under § 1132(a)(3), because the funds were not in the possession of the plan participant. Thus, the court below applies the same analogy as that utilized by the district courts within the Seventh Circuit.

Varco further asserts that the panel below is the first and only panel of the federal circuit courts of appeal to find federal subject matter jurisdiction for an ERISA plan administrator's claim for reimbursement against a plan participant's personal injury recovery. (Varco Petition, p. 16). This is clearly incorrect. As previously discussed, many other circuit courts have found that subject matter jurisdiction exists in these types of cases. *See Honolulu*, 332 F.3d at 1238 (following *Great-West Life* and holding that equitable restitution in the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant); *Bombardier*, 2003 U.S. App. LEXIS at *18 (finding that the imposition of a constructive trust over specifically identifiable settlement funds was equitable in nature and permitted by § 502(a)(3)).

Based on the above, it is clear that there is no intra-circuit split in the Seventh Circuit regarding the availability of equitable relief under 29 U.S.C. § 1132(a)(3). Therefore, a review by this Court is not warranted on this basis.

IV. There is no issue of substantial importance.

There is no urgent need for this Court to review the decision below, as alleged by Varco. This Court has already outlined the circumstances under which a Plan can seek reimbursement under ERISA, and the court below followed its application. As previously discussed, this Court, the Seventh Circuit, other circuit courts, and other panels of the Seventh Circuit all agree that the federal courts have subject matter jurisdiction to preside over an ERISA plan's reimbursement claim against a plan participant who has made a personal injury recovery, so long as the

funds sought are identifiable; in the control of the defendant; and the Plan is rightfully entitled to the monies under the terms of the Plan. *See Great-West Life*, 534 U.S. at 213; *Varco*, 338 F.3d at 687; *Honolulu,* 332 F.3d at 1238; *Bombardier*, 2003 U.S. App. LEXIS at *18; *Wells*, 213 F.3d at 401. Thus, the issue of when a Plan can seek reimbursement under ERISA has been well established by this Court and followed by other courts. Therefore, there is no need for the Court to review this issue.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN, Plaintiff-Appellee, versus FERRER, POIROT AND WANSBROUGH; ET ALS, Defendants, FERRER, POIROT AND WANSBROUGH; STEVEN MESTEMACHER, Defendants-Appellants.

No. 03-10195

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

December 17, 2003, Filed

COUNSEL: For BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN, Plaintiff-Appellee: Neal Stuart Manne, Joseph Samuel Grinstein, Susman Godfrey, Houston, TX.

For FERRER, POIROT AND WANSBROUGH, STEVEN MESTEMACHER, Defendants-Appellants: John Thomas Kirtley, III, Ferrer, Poirot & Wansbrough, Dallas, TX.

For ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR, Amicus Curiae: Elizabeth Hopkins, US Department of Labor, Washington, DC.

JUDGES: Before JOLLY and WIENER, Circuit Judges and WALTER,* District Judge.

OPINION BY: WIENER

OPINION: WIENER, Circuit Judge:

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* District Judge of the Western District of Louisiana, sitting by designation.

Defendants-Appellants Ferrer, Poirot & Wansbrough, P.C. (the "law firm") and Steven Mestemacher appeal the district court's grant of the summary judgment motion of Plaintiff-Appellee Bombardier Aerospace Employee Welfare Benefits Plan (the "Plan"), an ERISA-governed, self-funded employee welfare benefit plan, to enforce the terms of the Plan's reimbursement provision against the law firm and Mestemacher. They also appeal the district court's denial of their respective motions to dismiss the Plan's action for lack of subject matter jurisdiction and for failure to state a claim, as well as its denial of their joint motion for summary judgment. We affirm.

I. FACTS AND PROCEEDINGS

A. Background

The Plan was established by Bombardier Aerospace to provide managed care services for its employees and their dependents.[1] Mestemacher was an employee of Bombardier Aerospace and a participant in the Plan. After he was injured in an automobile accident, he sought $ 13,643.63 from the Plan for medical expenses. The Plan paid Mestemacher's medical expenses in that amount, subject to a "Reduction, Reimbursement and Subrogation" provision contained in the Plan's documents. That provision gave the Plan "the right to recover or subrogate 100% of the Benefits paid . . . by the Plan for Covered Persons to the extent of . . . [a]ny judgment, settlement, or payment made or to be made, because of an accident, including but not limited to insurance." The documents further specified

[1] *See* 29 U.S.C. § 1002(1).

that "attorneys fees and court costs are the responsibility of the participant, not the Plan."

Mestemacher retained the law firm on a one-third contingent fee basis to seek recovery from the tortfeasor responsible for the automobile accident. After negotiating a $ 65,000 settlement, the law firm received the settlement payment on Mestemacher's behalf and placed the funds in a trust account at Bank of America in the law firm's name.

B. The Instant Litigation

This action arises out of the Plan's efforts to obtain reimbursement for the funds advanced to Mestemacher. The Plan filed suit in district court against the law firm, Mestemacher, and Bank of America before Mestemacher's settlement funds were ever disbursed to him from the law firm's trust account at Bank of America.[2] In its efforts to recover the funds that it had advanced to Mestemacher for medical expenses, the Plan sought (1) the imposition of a constructive trust over $ 13,643.63 of the funds being held for Mestemacher in the law firm's trust account, (2) a declaration that the Plan is entitled to ownership of that amount out of the settlement funds that remained in the trust account, (3) an order directing the law firm and Bank of America to execute any instruments necessary to transfer legal title of the "converted property" to the Plan, and (4) a temporary restraining order and a preliminary

[2] Bank of America was voluntarily dismissed from this suit after settling with all parties.

injunction prohibiting the law firm from disbursing the share of the settlement funds claimed by the Plan.

In an agreed order, the law firm consented to hold $ 18,500.00 of the settlement proceeds in its trust account, an amount more than sufficient to satisfy the Plan's reimbursement demand. The law firm nevertheless maintained that it was entitled to one-third of the proceeds of the settlement ($ 21,666.66) plus costs ($ 302.24), by virtue of its contingent fee agreement with Mestemacher. The law firm and Mestemacher each filed a motion to dismiss for lack of subject matter jurisdiction, contending that § 502(a)(3) of ERISA does not provide a cause of action against an entity like the law firm, which is neither a plan fiduciary nor a signatory to the plan, and does not authorize the Plan's claim for a constructive trust over funds not in the possession of its participant, Mestemacher.

Agreeing with the Plan's assertion that it was seeking "equitable relief" within the contemplation of § 502(a)(3), the district court accepted subject matter jurisdiction over the Plan's action and denied Mestemacher's and the law firm's motions to dismiss. Agreeing further that the terms contained in the Plan's documents provide a right of reimbursement, the district court granted summary judgment in favor of the Plan and ordered the law firm to transfer to the Plan the sum of $ 13,643.63 from the settlement proceeds being held in its trust account. This judgment further ordered that nothing be deducted from the Plan's funds for attorneys' fees and costs.

Citing our opinion in *Sunbeam-Oster Company, Inc. Group Benefits Plan for Salaried and Non-Bargaining Hourly Employees v. Whitehurst,*[3] the district court observed that the Plan contained "clear and unambiguous reimbursement provisions, including a provision allowing the Plan reimbursement from third party beneficiaries such as settlement proceeds."[4] As for whether the Plan had stated a claim under § 502(a)(3), the court noted that the Plan did not seek to impose *in personam* liability on any of the defendants, but merely sought the *in rem* imposition of a constructive trust over funds in the trust account. Thus, the district court concluded, the Plan's claim was for "appropriate equitable relief" under § 502(a)(3) and fell comfortably within that jurisdictional grant. Finally, the court refused to apply either the Texas or the federal version of the common fund doctrine to block the Plan's recovery, noting that "the Plan expressly provides that attorney's fees and court costs are the responsibility of Mestemacher and not the Plan." Final judgment was entered in the Plan's favor, and Mestemacher and the law firm timely filed a notice of appeal.

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[3] 102 F.3d 1368 (5th Cir. 1996).

[4] All parties agree that the Plan's language unambiguously provides for a right of reimbursement and subrogation. As neither party seeks a construction of the Plan's terms, we need not engage in application of the deference principles articulated by the Supreme Court in *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989).

II. ANALYSIS

A. Standard of Review

We review *de novo* both a grant of a motion to dismiss and a grant of a motion for summary judgment.[5] In our *de novo* review of a district court's ruling on a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), we apply the same standard as does the district court: "[A] claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief."[6]

B. Subject Matter Jurisdiction

To determine whether the district court properly exercised subject matter jurisdiction over the instant action, we first must decide whether § 502(a)(3) authorizes the Plan's suit for a constructive trust over the funds held in the law firm's trust account.[7] The law firm and Mestemacher assert two bases for holding that § 502(a)(3) does not authorize the Plan's suit. They first contend that, because the law firm was not a signatory to the Plan, it is

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[5] *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000).

[6] *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992); *see also St. Paul Mercury Ins. Co.*, 224 F.3d at 440 n.8 ("[T]he central issue [in reviewing a motion to dismiss] is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.").

[7] *See Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 442 (5th Cir. 2002) ("ERISA grants the federal courts 'exclusive jurisdiction of civil actions under this title brought by . . . [a] fiduciary.'"). The parties agree that the Plan is governed by ERISA and that the Plan is a "fiduciary" under ERISA.

not a fiduciary; thus the Plan cannot maintain an action for equitable relief against the law firm under § 502(a)(3). They contend secondly that the Plan's action for a constructive trust is not one "typically available in equity" and thus falls outside § 502(a)(3)'s jurisdictional grant.

1. The "Universe of Possible Defendants" under § 502(a)(3).

Section 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."[8] The law firm and Mestemacher contend that this authorization is contingent on the existence of a professional or contractual relationship between the Plan and the particular defendant that is subject to suit. In other words, according to them, an entity must owe a duty to an ERISA plan before it can properly be named as a defendant in a § 502(a)(3) suit for equitable relief. Because it is not a signatory of the Plan, insists the law firm, it owes no fiduciary duty to the Plan, and thus no cause of action can be maintained against it under § 502(a)(3).[9] We disagree.

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[8] 29 U.S.C. § 1132(a)(3).

[9] For purposes of this case, a person is a plan fiduciary to the extent that he exercises discretionary authority or control over the management or administration of the plan or its assets, or renders investment advice to the plan for compensation. *See* 29 U.S.C. § 1002(21)(A). The parties agree that the law firm is not a plan fiduciary.

Although neither we nor the Supreme Court has squarely addressed the question whether a plan participant's or beneficiary's attorney who possesses disputed settlement funds on his client's behalf can be subject to suit under § 502(a)(3), the Supreme Court has ruled that § 502(a)(3) liability is not dependent on an entity's status as a plan fiduciary. In *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*,[10] the Court squarely held that § 502(a)(3) authorizes suit against a non-fiduciary "party in interest" to a transaction prohibited under § 406(a).[11] In so holding, the Court rejected the Seventh Circuit's holding that no cause of action exists under § 502(a)(3) absent a substantive provision of ERISA expressly imposing a duty on the party being sued. The Court observed that § 502(a)(3) "admits of no limit (aside from the 'appropriate equitable relief' caveat . . .) on the universe of possible defendants."[12] Indeed, the Court noted that, in contrast to other provisions of ERISA which expressly delineate the entities subject to suit,[13] "§ 502(a)(3) makes no mention at all of which parties may

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[10] 530 U.S. 238, 147 L. Ed. 2d 187, 120 S. Ct. 2180 (2000).

[11] *See id.* at 241. ERISA both imposes a general duty of loyalty on plan fiduciaries, § 406(a); 29 U.S.C. § 1104, and, "categorically bar[s] certain transactions deemed 'likely to injure the pension plan.'" § 406(a)(1); 29 U.S.C. § 1106.

[12] *Id.* at 244-246.

[13] For example, the following ERISA provisions explicitly delineate the entities subject to suit: (1) "§ 409(a), 29 U.S.C. § 1109(a) ('Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable');" and (2) "§ 502(l), 20 U.S.C. § 1132(1) (authorizing imposition of civil penalties only against a 'fiduciary' who violates part 4 of Title I or 'any other person' who knowingly participates in such a violation)." *Id.* at 246-47.

be proper defendants."[14] This is because "§ 502(a)(3) itself imposes certain duties, and therefore . . . liability under that provision does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued."[15]

The litigation in *Harris Trust* arose out of a soured business deal between an ERISA plan and a "party in interest." National Investment Services of America ("NISA") had been hired by the plan's administrator to act as an investment manager for the plan.[16] Because it had "discretionary control" over plan assets, NISA qualified as a plan fiduciary.[17] Salomon Smith Barney, Inc. ("Salomon") furnished the plan with broker-dealer services at the direction of the fiduciaries, thus qualifying under § 3(14) as a "party in interest."[18] During the relevant time, Salomon sold to the plan, through NISA, interests in several motel properties that later turned out to be worthless.[19]

On learning of the nature of this transaction, the plan's administrator and its trustee filed suit against Salomon under § 502(a)(3), claiming, *inter alia*, "that NISA, as plan fiduciary, had caused the plan to engage in a *per se* prohibited transaction under § 406(a) in purchasing the motel interests from Salomon."[20] Salomon countered that

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[14] *Id.* at 246.

[15] *Id.* at 245.

[16] *See id.* at 242-43.

[17] *Id.* at 243.

[18] *See id.* at 242.

[19] *Id.* at 243.

[20] *Id.*

§ 502(a)(3) authorizes suit "only against the party expressly constrained by 406(a)," namely, the fiduciary who caused the party to enter into the prohibited transaction, and not the "counterparty to the transaction."[21] The Seventh Circuit agreed with Salomon, but the Supreme Court reversed for the reasons stated above.[22] Therefore, even though, in the instant litigation, the law firm is not a "party in interest," as that term is defined by ERISA,[23] the Supreme Court's reasoning in *Harris Trust* influences us to conclude today that § 502(a)(3) authorizes a cause of action against a non-fiduciary, non-"party in interest" attorney-at-law when he holds disputed settlement funds on behalf of a plan-participant client who is a traditional ERISA party. As *Harris Trust* makes clear, an entity need not be acting under a duty imposed by one of ERISA's substantive provisions to be subject to liability under § 502(a)(3).

To this end, we note that the law firm's reliance on the Seventh Circuit's opinion in *Health Cost Controls of Illinois, Inc. v. Washington*[24] in support of the law firm's contrary position – that an entity must be a plan fiduciary before it can be properly named as a defendant in a § 502(a)(3) action – is badly misplaced. The question before

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[21] *Id.*

[22] *See id.* at 244-45.

[23] The term " 'party in interest' . . . encompasses those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." *Harris Trust*, 530 U.S. at 242. Finding nothing in the record that would suggest that the law firm is an entity likely to be favored by the plan's fiduciaries, we will assume that the law firm is not a "party in interest."

[24] 187 F.3d 703 (7th Cir. 1999).

the *Health Cost* court was not, as here, which entities can be subject to suit under § 502(a)(3), but rather which entities are entitled to bring suit under § 502(a)(3). In *Health Cost,* the Seventh Circuit addressed, *inter alia,* whether the assignee of an ERISA plan's reimbursement claims qualified as an ERISA fiduciary and thus as a proper plaintiff in a suit for a constructive trust under § 502(a)(3). Although the court noted that a lawyer hired by an ERISA plan to bring suit on the plan's behalf is not an ERISA fiduciary, and thus not a proper plaintiff to a § 502(a)(3) action, it held that, because an assignee of a plan's reimbursement claims exercises greater discretion over the plan's assets than does the plan's lawyer, the assignee qualified as a fiduciary and thus as a proper plaintiff under § 502(a)(3).[25]

Without a doubt, the text of § 502(a)(3) places limits on the proper plaintiffs to a suit for equitable relief: As the language of that provision expressly states, a civil action for equitable relief may be brought only by a "participant, beneficiary, or fiduciary" of an ERISA plan.[26] Congress did not see fit, however, to include a similar limitation on the set of proper defendants to a § 502(a)(3) action, and we decline the law firm's invitation to impose such limits judicially today.[27]

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[25] *See id.* at 709.

[26] *See Harris Trust,* 530 U.S. at 248 ("§ 502(a) itself demonstrates Congress' care in delineating the universe of plaintiffs who may bring certain civil actions.").

[27] The other cases cited by the law firm in support of its proposition that it must be a plan fiduciary to be a proper defendant under § 502(a)(3) are equally inapposite. The issue in each of these cases was

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In sum, the law firm's status as a non-fiduciary would have some relevance to this case if the Plan were seeking to saddle the lawyers with personal liability for the breach of a fiduciary duty. As it stands, however, the only action that the Plan asserts is one for equitable in rem relief under § 502(a)(3). As liability under that provision does not depend on whether a substantive provision of ERISA imposes a duty on the particular defendant subject to suit, we hold that the law firm, as counsel for the plan participant and stake holder of specifically identifiable settlement funds in a trust account – on that beneficiary's behalf – fits comfortably within the "universe of possible defendants" subject to suit under that provision.

2. "Appropriate Equitable Relief" under § 502(a)(3)

The law firm and Mestemacher contend next that, despite styling its action as one for a "constructive trust" over the funds contained in the law firm's trust account,

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whether the plan could properly maintain an action against the defendant-attorney for either breach of contract or breach of fiduciary duty – not for equitable relief under § 502(a)(3). *See Southern Council of Indus. Workers v. Ford,* 83 F.3d 966, 969 (8th Cir. 1996) (subject matter jurisdiction exists over plan's claim for breach of fiduciary duty against beneficiary's attorney who signed the plan's subrogation agreement); *Witt v. Allstate Ins. Co.,* 50 F.3d 536, 538 (8th Cir. 1995) (beneficiary's insurer is not a fiduciary subject to liability to the plan for breach of fiduciary duty); *Hotel Employees & Rest. Employees Int'l Union Welfare Fund v. Gentner,* 50 F.3d 719, 721 (9th Cir. 1994) (beneficiary's attorney is not liable for breach of fiduciary for failing to reimburse plan prior to distributing settlement funds to the beneficiary); *Chapman v. Klemick,* 3 F.3d 1508, 1508-09 (11th Cir. 1993) (beneficiary's attorney is not a fiduciary subject to liability to the plan for breach of fiduciary duty).

the Plan actually seeks to impose personal liability on the defendants to enforce Mestemacher's contractual reimbursement obligation to the Plan for the amount he received in benefits. Thus, they argue, the Plan's suit is essentially legal in nature – as distinguished from equitable – and falls outside the scope of "appropriate equitable relief" permitted by § 502(a)(3). The Plan responds – correctly, we conclude – that because it seeks to recover specifically identifiable funds that are in the constructive possession and the legal control of the participant but belong in good conscience to the Plan, its action for a constructive trust in no way seeks to impose personal liability on either defendant. Instead, the Plan continues, it seeks relief that indeed is equitable in nature and thus authorized by § 502(a)(3).

In *Mertens v. Hewitt Associates,* the Supreme Court interpreted "appropriate equitable relief" under § 502(a)(3) to include only "those categories of relief that were typically available in equity."[28] Subsequently, the Court, in *Great-West Life & Annuity Insurance Co. v. Knudson,* elaborated on the distinction between "legal" and "equitable" relief, stating that "a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[29] On the other hand, reasoned

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[28] 508 U.S. 248, 256, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993).

[29] 534 U.S. 204, 213, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002) (citations omitted). In *Knudson,* the plan administrator sought to recover benefits paid to a beneficiary following the latter's receipt of

(Continued on following page)

the Court, if "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains," "[the plaintiff's] claim is only that of a general creditor, and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'"[30] In such an instance, the plaintiff is seeking a legal remedy – the imposition of personal liability on the defendant to pay a sum of money to which the plaintiff is owed – so his claim falls outside § 502(a)(3)'s jurisdictional grant.[31]

Recently, in *Bauhaus USA, Inc. v. Copeland,*[32] we interpreted *Mertens* and *Knudson* in the context of a plan administrator's suit to recover benefits previously paid to a plan beneficiary, after settlement funds from a third party tortfeasor were received on behalf of the beneficiary. The administrator of the plan sought the imposition of a constructive trust over the portion of the funds that had

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settlement funds from a third-party tortfeasor. *See Knudson,* 534 U.S. at 208. The funds, however, had been placed in a Special Needs Trust for the beneficiary to provide for her medical care pursuant to California law. *See id.* at 207-08. The Supreme Court rejected the plan administrator's argument that it sought equitable relief under § 502(a)(3), stating that "the funds to which [the plan] claims an entitlement under the Plan's reimbursement provision . . . are not in the [beneficiary's] possession." *Id.* at 214. As the plan essentially sought "the imposition of personal liability [upon the beneficiary] for the benefits" it had conferred, the Court held that its claim was legal, rather than equitable, in nature and thus fell outside the scope of relief authorized by § 502(a)(3). *Id.*

[30] *Id.* at 213-14 (citing *RESTATEMENT (FIRST) OF RESTITUTION* § 215 (1937)).

[31] *See id.* at 210 (citing *Mertens,* 508 U.S. at 256.)

[32] 292 F.3d 439 (5th Cir. 2002).

been placed in the registry of the Mississippi Chancery Court, pursuant to the terms of a tort settlement agreement, to satisfy any liens against the funds.[33] Focusing on the language in *Knudson* regarding the beneficiary's possession of the disputed funds, the panel majority in *Bauhaus* found the facts of the case before it legally indistinguishable from those considered by the Supreme Court in *Knudson*.[34] The court observed that the disputed funds in *Knudson* were outside the "possession and control" of the beneficiary, having been placed in a Special Needs Trust to cover the beneficiary's medical expenses.[35] Reasoning that funds placed in the court registry were just as much beyond the "possession and control" of the beneficiary as those placed in a Special Needs Trust, the panel majority held that the plan's suit did not lie in equity and was therefore unauthorized by § 502(a)(3).[36]

Although the facts of *Knudson* and *Bauhaus* resemble those in Mestemacher's case in several respects, those cases are significantly distinguishable from Mestemacher's. To verify this conclusion, one need only compare the facts of these three cases by answering the relevant three-part inquiry: Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary? In both *Knudson* and *Bauhaus,* as in the instant case, the benefit

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[33] *See id.* at 441.

[34] *See id.* at 445.

[35] *See id.*

[36] *See id.*

plans sought to recover funds from a specifically identifiable corpus of money that they had paid out previously as benefits. Likewise, in each case, the plan's terms contained an express, unambiguous reimbursement provision which made the disputed funds "belong in good conscience" to the plan. It is, however, the third element of the inquiry – the defendant-beneficiary's "possession and control" over the disputed funds – that distinguishes *Knudson* and *Bauhaus* from the case before us today.

In *Knudson* and *Bauhaus,* the beneficiary had neither actual nor constructive possession or control over the funds. In *Knudson,* the funds had been placed in a Special Needs Trust, as mandated by California law, to provide for the beneficiary's medical care, and the trustee was totally independent of the plan beneficiary. Similarly, in *Bauhaus,* the funds had been deposited in the state court's registry in anticipation of an interpleader action to determine their ownership. Obviously, that court was totally independent of the plan beneficiary. Here, in stark contrast, the funds that the Plan is seeking to recover belong to the participant and are simply being held in a bank account in the name of the participant's attorneys, who are indisputably his agent. Unlike the beneficiaries in *Knudson* and *Bauhaus,* the Plan's participant, Mestemacher, has ultimate control over, and thus constructive possession of, the disputed funds. The law firm and Mestemacher concede that the law firm is merely holding the funds in its trust account on Mestemacher's behalf – as Mestemacher's agent – and is legally obligated to disburse the funds to Mestemacher the moment he directs their release. This crucial distinction is more than sufficient to warrant a finding that the Plan's action is indeed "equitable" in nature.

The Seventh Circuit's recent opinion in *Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco* offers further support for our determination that the Plan's action for a constructive trust lies in equity.[37] In *Varco,* the ERISA plan sought to enforce the provisions of a subrogation clause against a participant through imposition of a constructive trust over settlement funds from a third party tortfeasor.[38] The participant's attorney had accepted delivery of the funds from the tortfeasor on the participant's behalf prior to the plan's filing suit and, after taking out an amount sufficient to cover his fees, the lawyer had placed the remaining funds in a reserve account in the participant's name.[39] Noting that (1) the participant had "control" over the disputed funds, (2) the funds were "identifiable, and [had] not been dissipated," and (3) the funds, "in good conscience," belonged to the plan, the Seventh Circuit held that the plan's action for a constructive trust was equitable in nature and therefore authorized by § 502(a)(3).[40]

In making the same determination today, we remain unpersuaded by the contention voiced by the law firm during oral argument to the effect that Mestemacher lacks "possession and control" over the one-third share of the $ 18,500 contained in the trust account to which the law firm asserts ownership by virtue of its contingent fee agreement with Mestemacher. This assertion ignores Mestemacher's pre-existing contractual reimbursement

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[37] 338 F.3d 680 (7th Cir. 2003).

[38] *See id.* at 683-84.

[39] *See id.* at 684.

[40] *See id.* at 687-88.

obligation to the Plan, which requires him to reimburse the Plan the full amount of the benefits that he had received from the Plan and to do so out of any third-party recovery, without deduction for attorney's fees and costs. This pre-existing reimbursement obligation to the Plan precluded Mestemacher from contracting away to the law firm that which he did not own himself, namely, the right to all or any portion of the $ 13,643.63 that rightfully belonged to the Plan. In essence, Mestemacher could not create a greater right in the funds by virtue of entering the contingent fee arrangement with the law firm than Mestemacher had himself.

In addition, Mestemacher's contingent fee agreement does not restrict his obligation to compensate the law firm solely to the proceeds of his recovery. Rather, that agreement creates an in personam obligation, requiring Mestemacher to pay counsel an amount equivalent to one-third of his recovery. Mestemacher is personally responsible to the law firm for its attorneys' fees in an amount equal to one-third of his recovery. The fact that he may have to satisfy some part or even all of this personal obligation out of his own pocket in no way diminishes his pre-existing reimbursement obligation to the Plan vis-a-vis the funds recovered from his tortfeasor. We are satisfied that neither Mestemacher's contingency fee agreement with the law firm nor the location of the settlement funds in the trust account affects his legal "possession and control" over the disputed $ 13,643.63. Our conclusion in this regard is consistent with Judge Posner's opinion for the Seventh Circuit in *Wal-Mart Stores, Inc. Assoc. Health and Welfare*

Plan v. Wells,[41] in which that court held, on substantially similar facts, that a plan administrator's § 502(a)(3) suit for a constructive trust over settlement funds presumed to be held in escrow by the participant's attorney "nestle[d] comfortably" within "ERISA's concept of equity."[42]

Having closely examined the substance of the relief sought in the case before us, we are convinced that, in its efforts to recoup the amount paid to Mestemacher in benefits, the Plan does not seek to impose personal liability on either Mestemacher or his counsel. Thus, we hold the Plan's requested relief – the imposition of a constructive trust over specifically identifiable settlement funds held in the trust account of the law firm as agent for Mestemacher – to be equitable in nature. Accordingly, we further hold that § 502(a)(3) authorizes the Plan's claim for relief, and we affirm the district court's exercise of subject matter jurisdiction over this action.[43]

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[41] 213 F.3d 398, 401 (7th Cir. 2000).

[42] *Id.*

[43] We recognize that our holding today is at variance with the Ninth Circuit's recent opinion in *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002). In *Westaff*, the Ninth Circuit held that a plan administrator's suit to recoup benefits paid to a beneficiary upon the beneficiary's receipt of settlement funds from a third party tortfeasor was essentially legal in nature, even though the beneficiary had placed the funds in an escrow account in the beneficiary's name pending a determination of to whom the money was owed. *See id.* at 1167. Acknowledging that the disputed funds held in escrow were "specifically identifiable," the Ninth Circuit nevertheless held that the funds were "a legitimate personal injury settlement to which the beneficiary is entitled" and that the administrator's action was essentially "one for money damages" falling outside the jurisdictional grant of § 502(a)(3). *Id.* We perceive that decision to depart from the Supreme Court's opinions in *Mertens* and *Knudson*, and from our own precedent in

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C. Actual Fraud and Unjust Enrichment

We turn next to the question whether a showing of either actual fraud or unjust enrichment, or both, on the part of Mestemacher and the law firm is required before a constructive trust can be imposed on the disputed funds. Noting correctly that ERISA does not specify the elements of a constructive trust in a § 502(a)(3) action,[44] the law firm and Mestemacher maintain that this lacuna in the statutory text should be filled by Texas law. Under that State's law, a plaintiff seeking a constructive trust must establish, *inter alia,* (1) the breach of a fiduciary relationship or, alternatively, actual fraud, and (2) unjust enrichment of the wrongdoer.[45]

Bauhaus, so we decline to follow the Ninth Circuit's more restrictive view of the scope of "appropriate equitable relief" under § 502(a)(3).

[44] *See* 29 U.S.C. § 1132(a)(2).

[45] *See, e.g., Haber Oil Co. v. Swinehart,* 12 F.3d 426, 437 (5th Cir. 1994). We recognize in passing that our precedent interpreting Texas law as it relates to constructive trusts has not been altogether consistent. In some cases, we have interpreted Texas law as requiring a showing of actual fraud or breach of fiduciary duty prior to imposition of a constructive trust. *See id.* at 437 (the elements of a constructive trust under Texas law include, *inter alia,* "breach of a fiduciary relationship, or in the alternative, actual fraud . . . . ") (citing *In re Monnig's Dept. Stores, Inc.*, 929 F.2d 197, 201 (5th Cir. 1991)). More recently, we held that it was sufficient under Texas law for a plaintiff to show merely constructive fraud, as opposed to actual fraud or wrongdoing. *See Burkhart Grob Luft Und Raumfahrt GmbH & Co. v. E-Systems, Inc.,* 257 F.3d 461, 469 (5th Cir. 2001) (the elements of a constructive trust under Texas law include a showing of either actual or constructive fraud) (citing *Haber Oil Co., Inc. v. Swinehart,* 12 F.3d 426, 437 (5th Cir. 1994)). If indeed constructive fraud is all that is required under Texas law, then the district court clearly did not err in not making a finding of fraud, for the requirement of "constructive fraud" is "merely an expression of the idea that a constructive trust may arise in the

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In recognition of ERISA's overarching aim of national uniformity, we have consistently held that any hiatus in ERISA's text must be filled by application of federal common law rather than the law of any particular state.[46] Accordingly, Texas law is not directly applicable to the Plan's claim, and the Plan will not be required to establish actual fraud and unjust enrichment – unless, that is, some basis exists for concluding that these elements are required under a federal common law standard for the imposition of a constructive trust.

Although the law firm and Mestemacher argue alternatively that we should incorporate the Texas law elements of actual fraud and unjust enrichment into the federal common law rule, federal common law – like gaps in ERISA's statutory provisions – cannot be defined solely by reference to the law of but a single state. This is especially true when adherence to the strictures of Texas law would require the Plan to establish actual fraud on the part of either Mestemacher or the law firm, an element that has never been required by the Supreme Court or this

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absence of fraud." SCOTT ON TRUSTS § 462 (4th ed. 2001). Nevertheless, because some confusion exists as to this issue, and because the issue was not briefed by the parties, we will assume arguendo for purposes of the instant analysis that Texas law requires a showing of actual fraud or breach of fiduciary duty prior to imposition of a constructive trust.

[46] *See Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 303 (5th Cir. 1992) ("Both the legislative history and the case law pursuant to ERISA validate our application of federal common law to ERISA."); *see also Rodrigue v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991) ("Congress intended that federal courts should create federal common law when adjudicating disputes regarding ERISA.").

Circuit. Indeed, as discussed in the preceding section, *Knudson* requires a § 502(a)(3) plaintiff seeking a constructive trust to show only the existence of "money or property identified as belonging in good conscience to the plaintiff [that can] clearly be traced to particular funds or property in the defendant's possession," and makes no mention of the necessity of showing actual fraud or wrongdoing on the part of the defendant.[47] Neither does *Bauhaus,* which contains our most recent discussion of the circumstances in which a constructive trust may be imposed under § 502(a)(3), suggest that a showing of actual fraud or wrongdoing is required.

Further, as did the *Knudson* Court in its efforts to define the contours of "appropriate equitable relief" under § 502(a)(3), we look to "standard current works, such as Dobbs, Palmer, Corbin, and the Restatements" in ascertaining the federal common law rule to be applied.[48] Of those works, two that have squarely considered whether a showing of fraud or wrongdoing is required for imposition of a constructive trust have concluded that such a trust may properly be imposed in the absence of fraud.[49] Based on these expressions, as well as the absence of any indication in our precedent or that of the Supreme Court to the effect that federal common law requires that actual fraud

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[47] *Knudson,* 534 U.S. at 213.

[48] *Id.* at 716.

[49] SCOTT ON TRUSTS § 462 (4th ed. 2001) ("[T]here are numerous situations in which a constructive trust may be imposed in the absence of fraud."); 1 DOBBS LAW OF REMEDIES § 4.3(2) (2d ed. 1993) ("Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries or in cases of fraud . . . but this is a misconception.").

be established before a constructive trust can be imposed under § 502(a)(3),[50] we hold today that federal common law does not require a plaintiff in a § 502(a)(3) action to show that he was the victim of actual fraud or wrongdoing as a prerequisite to obtaining a constructive trust.[51]

As for the additional requirement of Texas law that the defendant must have been unjustly enriched at the expense of the plaintiff, it is axiomatic that a party who

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[50] In considering whether federal common law permits imposition of a constructive trust in the absence of a showing of actual fraud or other wrongdoing, the Seventh Circuit has also answered the question in the negative. *See Health Cost Controls,* 187 F.3d at 711. Writing for the panel in *Health Cost,* Judge Posner noted that

> although the Ninth Circuit appears to believe that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust, *FMC Medical Plan v. Owens,* 122 F.3d 1258, 1261 (9th Cir. 1997), it has given no reason for this belief and there is no basis for it either in ERISA or in the principles of equity. Granted that in times of yore the constructive trust was available only as a remedy against trustees and other fiduciaries, 1 Dobbs, *supra,* § 4.3(2), p. 597, there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp.

Id.

[51] As today we hold that actual fraud is not an element required in a § 502(a)(3) action for a constructive trust, we do not reach the question whether the Plan has demonstrated actual fraud on the part of Mestemacher and the law firm. We note, however, that at least one other circuit has observed, on nearly identical facts, that the refusal of a participant's lawyer to turn over settlement proceeds that rightfully belonged to the plan constituted wrongdoing on the part of the lawyer. *See Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan v. Wells,* 213 F.3d 398, 401 (7th Cir. 2000) (lawyer's refusal to hand over settlement check to which plan claimed entitlement by virtue of its unambiguous reimbursement provision was "clearly wrongful").

retains funds "belonging in good conscience to another" is unjustly enriched at that other party's expense. None disputes that the Plan's terms unambiguously state a right to recover benefits that it has previously paid, up to the full extent of any settlement proceeds obtained by the participant or beneficiary. Thus, the disputed funds "belong in good conscience" to the Plan, and the law firm's and Mestemacher's continued retention of these funds would unjustly enrich them at the Plan's expense. Accordingly, even if we assume arguendo that unjust enrichment is a prerequisite, the Plan has produced sufficient evidence that the defendants would be unjustly enriched, entitling the Plan to have a constructive trust imposed on the disputed settlement funds.

D. Common Fund Doctrine

Finally, we consider whether the Plan's claim is subject to either the Texas or the federal "common fund" doctrine. There is no substantive difference between the Texas and federal versions of this doctrine; in essence, both provide that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[52] "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit

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[52] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980); compare *Lancer Corp. v. Murillo*, 909 S.W.2d 122 (Tex. Ct. App. 1995) ("Under the [Texas] common fund doctrine, the court may allow reasonable attorney's fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefitting other parties as well as himself.") (cites omitted).

without contributing to its costs are unjustly enriched at the successful litigant's expense."[53] In the instant case, the district court found this doctrine inapplicable to the Plan's claim for benefits because the language of the Plan expressly provided – long before Mestemacher was injured and long before he retained the law firm on a contingent fee basis – that "[a]ttorney's fees and court costs are the responsibility of the participant, not the Plan." We agree.

Although we have yet to address whether equitable fee sharing is warranted under the common fund doctrine when the Plan language expressly provides to the contrary, we held in *Walker v. Wal-Mart Stores, Inc.* that, when a plan's terms give it the right to recover benefits "to the extent of any and all" settlement payments, but fail to specify who bears the responsibility for fees and costs, the plan is nevertheless entitled to full recovery of the amount of the benefits paid without offset for fees and costs.[54] Here, the Plan's terms not only give it the right to recover benefits "to the extent of any and all" settlement

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[53] *Boeing*, 444 U.S. at 478; compare *Lancer Corp.*, 909 S.W.2d at 126 ("The common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses.") (citing *Trustees v. Greenough*, 105 U.S. 527, 532-37, 26 L. Ed. 1157 (1881); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799-801, 18 Tex. Sup. Ct. J. 120 (Tex. 1974)).

[54] 159 F.3d 938, 940 (5th Cir. 1998). Interpreting the plan's " 'any and all' language," the *Walker* panel held that such language "plainly means the first dollar of recovery (any) and 100% recovery (all) of the funds received by the plaintiff in the settlement, up to the full amount of the benefits paid." *Id.* The panel further noted that the fact that the plan did not "specifically mention attorneys' fees or set out detailed distribution procedures did not constitute silence or ambiguity on behalf of the plan," reasoning that ERISA plans should not be labeled "silent or unambiguous" simply for lack of "technical precision." *Id.*

payments, but explicitly state that the participant must bear the fees and costs associated with his tort action. Our holding in *Walker* thus supports our determination here that neither the federal nor Texas common fund doctrine may be invoked to prevent or reduce the Plan's recovery of the funds that it advanced to Mestemacher, up to the full amount of his recovery from the tortfeasor.

The Seventh Circuit's *Varco* opinion further supports this conclusion.[55] The *Varco* court refused to apply either the Illinois or federal common fund doctrine to defeat an ERISA plan's express provision that fees and costs were the sole responsibility of the participant.[56] Considering the Illinois doctrine first, the court held that, because application of that doctrine would contradict the express terms of the Plan, it was preempted by § 514 of ERISA.[57] Turning next to the federal common fund doctrine, the *Varco* court declined to offset the plan's recovery on that basis as well, noting that application of "federal common law to override the Plan's reimbursement provision would contravene, rather than effectuate, the underlying purposes of ERISA because the express terms of the Plan provided for the appropriate distribution of attorney's fees."[58] Thus, reasoned the Seventh Circuit, the federal common fund

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[55] 338 F.3d 680 (7th Cir. 2003)

[56] *See id.* at 692-93.

[57] *See id.* at 690. In addition to complete preemption under § 502(2), ERISA § 514 provides for conflict preemption when a state statute "directly conflicts with ERISA's requirements that the plans be administered, and benefits be paid in accordance with plan documents." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 150, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (2001); 29 U.S.C. 1144(a).

[58] *Varco*, 338 F.3d at 692.

doctrine should only be applied to offset an ERISA plan's recovery in the absence of controlling plan language that specifies the manner in which the costs of the underlying litigation are to be distributed.[59]

We agree with the Seventh Circuit's determination in *Varco* that the state and federal common fund doctrines are inapplicable when, as here, the controlling plan language clearly and unambiguously expresses that fees and cost are the sole responsibility of the participant. Accordingly, we hold that the district court correctly refused to apply either the Texas or federal common fund doctrines to allow a deduction from the Plan's recovery of a pro rata share of Mestemacher's attorney's fees and costs.

III. CONCLUSION

We affirm the district court's exercise of subject matter jurisdiction based on ERISA § 502(a)(3) over the Plan's action for a constructive trust because it is equitable in nature. Further, because federal common law does not require a showing of actual fraud or wrongdoing as an element of imposing a constructive trust, we affirm the district court's grant of the Plan's requested relief, despite an absence of such a showing. Finally, we affirm the district court's holding that neither the federal nor Texas common fund doctrine trumps the Plan's express language specifying that all fees and costs associated with the

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[59] *Id.* (citing *McIntosh v. Pacific Holding Co.*, 120 F.3d 911, 912 (8th Cir. 1997); *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141 (8th Cir. 1997)).

underlying tort litigation are to be born by the participant. Accordingly, the district court's decision is, in all respects,

AFFIRMED.

2002 US DIST. LEXIS 7246

Jack Bauer, et al, Plaintiffs, -vs- Delvin Gylten, Defendant. Jack Bauer, et al., Plaintiffs, -vs- Camrud, Maddock, Olson & Larson, Ltd., Defendant.

A3-00-161, A3-02-27

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION

April 22, 2002, Decided

COUNSEL: For JACK BAUER, RICHARD BERGSTAD, JIM BESSINE, DONALD BRUEMMER, CLINTON BURGE, RUTH CHERMOK, DON DAWSON, DAN FINNIE, ROBERT JARDING, STEVE JUNKER, JAMES KAVANAUGH, KENNETH KLEVER, ROGER LARSON, DOUG MARTIN, FRANCIS MAZZA, STEVEN MILLER, RYAN PENDERGRAFT, RANDY STAINBROOK, plaintiffs (00-CV-161, 02-CV-27): David S. Anderson, Richard L. Evans, Kathleen M. Brennan, McGRANN SHEA ANDERSON CARNIVAL STRAUGHN & LAMB, MINNEAPOLIS, MN.

For DELVIN GYLTEN, defendant (00-CV-161): Randall Shane Hanson, Patrick J. Maddock, CAMRUD, MADDOCK, OLSON & LARSON, LTD, GRAND FORKS, ND.

For CAMRUD, MADDOCK, OLSON & LARSON, LTD., defendant (02-CV-27): Randall Shane Hanson, Patrick, J. Maddock, CAMRUD, MADDOCK, OLSON & LARSON, LTD, GRAND FORKS, ND.

JUDGES: RODNEY S. WEBB, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: RODNEY S. WEBB

OPINION:

MEMORANDUM AND ORDER

I. Introduction

Before the Court are a several motions in each of the above captioned cases. First, in both cases there is a motion by plaintiffs for a temporary injunction and a preliminary injunction, as well as for hearings on both (doc. # 3 in A3-02-27; # 18 in A3-00-161). As explained below, these motions are **DENIED**. Second, plaintiffs seek to consolidate the two cases (doc. # 3 in A3-02-27; # 18 in A3-00-161). This motion is **GRANTED**. Finally, plaintiffs seek to amend the complaint in A3-00-161 (doc. # 18). This motion is also **GRANTED**. In addition to ruling on these motions, the Court essentially **REAFFIRMS** its earlier grant of summary judgment.

II. Background

The procedural history here is somewhat complicated, so the Court will briefly review it before proceeding. Defendant Delvin Gylten was covered by the ERISA plan of which plaintiff's are administrators; he was in an accident, and the plan paid for his medical bills. He then sought and recovered money from the third party tortfeasor who had caused the accident. Plaintiffs then initiated this action to recover ERISA benefits from Gylten pursuant to a subrogation agreement and various plan provisions. On cross motions for summary judgment, the Court on December 12, 2001, held that the plan could recover amounts paid dollar-for-dollar except to the extent the recovery was attributable to Gylten's wife. The Court did

not attempt to perform such an apportionment, however, and so did not enter any final judgment.

Then, on January 8, 2002, the United States Supreme Court decided *Great-West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002). In short, *Great-West* held that ERISA plans could not sue in law to recover plan benefits; such efforts at collection were limited to suits in equity. This Court considered that *Great-West* might have an effect on the ultimate outcome of the instant case, and so on January 28, 2002, it ordered the parties to provide additional briefing.

Before the time for briefing had run, plaintiffs commenced the action numbered A3-02-27, seeking injunctive relief requiring defense counsel to maintain the funds at issue and enjoin their distribution. They also sought to amend the complaint in A3-00-161 to add explicitly equitable remedies. The parties arranged a stipulation – approved by the Court – by which defense counsel agreed to maintain the funds, essentially giving plaintiffs what they sought as injunctive relief. This stipulation also extended the time for filing supplemental briefs; this period has now run and the Court has received and considered these briefs. The Court now enters several rulings on the motions before it.

III. Analysis

A. Temporary restraining order & preliminary injunction

As mentioned, the parties have essentially stipulated to the injunctive relief sought (doc. # 20 in A3-00-161). Therefore, the Court considers these motions moot, and

they are **DENIED**. The Court thanks the parties for working to achieve this result.

B. Motion to consolidate

In light of the above motion, there is little left in A3-02-27. However, to the extent any issues remain, it makes sense to resolve them together with the primary case. Therefore, the motion to consolidate cases A3-00-161 and A3-02-27 is **GRANTED**.

C. Motion to amend

Plaintiffs seek to amend the complaint in A3-00-161 to request the creation of a constructive trust, consisting of the monies which they claim under the plan and which defense counsel is currently holding, and transfer of that trust to them. This amendment would essentially bring their complaint in line with *Great-West*, as it seeks the kind of equitable relief the Supreme Court held ERISA authorizes plans to seek. The first question is thus whether to allow the amendment; assuming the Court does so, the substantive issues could then be addressed.

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party at this stage of a case "may amend [its] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." This decision lies in the discretion of the trial court. *See generally Grandson v. Univ. of Minnesota,* 272 F.3d 568, 575 (8th Cir. 2001). A number of courts confronting the situation facing the Court here have concluded that amendments intended to reflect a recent change in decisional law are generally permissible. *See,*

e.g, Gregory v. Harris-Teeter Supermarkets, Inc., 728 F. Supp. 1259, 1260 (W.D.N.C. 1990); *Vanguard Savings & Loan Ass'n V. Banks,* 1995 WL 379999 (E.D. Pa. June 27, 1995).

The Court agrees with this general proposition, and finds its application appropriate here for several reasons. First, this case does not involve discovery; the parties submitted it for summary judgment on stipulated facts. There is therefore no real trial schedule which will be affected by amendment. Second, it is only proper that the decision here reflect the current state of the law, and this amendment is necessary to achieve that result. Therefore, the motion to amend is **GRANTED**, and the proposed amended complaint is **ORDERED FILED**.

D. Effect of *Great-West* on earlier summary judgment

In its December 12, 2001, order granting summary judgment to plaintiffs, the Court held that the plan language allowed plaintiff to collect, from defendant's third-party recovery, benefits paid on behalf of defendant except to the extent that the monies were attributable to defendant's wife's loss of consortium claim. The Court did not attempt to perform such an allocation, however, and the parties have not since put that issue before the Court. The only question at this point, therefore, is whether *Great-West* changes the Court's original ruling. The Court concludes that it does not.

The holding of *Great-West* is fairly limited. In it, the Court was required to construe ERISA § 502(a)(3), codified at 29 U.S.C. § 1132(a)(3), which provides in relevant part:

> A civil action may be brought –
>
> > (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

Plaintiff *Great-West*, an ERISA plan, had sued defendant Knudson to recover benefits it paid on her behalf after she was rendered a quadriplegic in a car accident. *Great-West*, 122 S. Ct. at 711. The procedural history of the case was quite complicated, and the Court will not dwell on that procedure here. *Id.* For purposes of this case, the key is that part of the relief *Great-West* sought was "judicially decreed reimbursement," which the Ninth Circuit ultimately held was not the sort of equitable relief authorized by § 502(a)(3). *Great-West* 122 S. Ct. at 712.

The Supreme Court granted certiorari and affirmed this conclusion. In so doing, it affirmed its earlier definition of "equitable relief" as "those categories of relief that were typically available in equity." *Id.* (citing *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 256, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993)). After characterizing the relief *Great-West* sought as "personal liability . . . for a contractual obligation to pay money," the Court concluded that because this was not relief typically available in equity, *Great-West* could not obtain it from Knudson. *Great-West* 122 S. Ct. at 713.

Of particular relevance to the instant case is the Supreme Court's recognition that permissible equitable relief could include restitution, so long as it was "in the

form of a constructive trust or equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West* 122 S. Ct. at 714. The court would then order transfer of the property in trust to the plaintiff. *Id.* According to the Court, the key is that "the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Great-West* 122 S. Ct. at 714-15. While admitting that this was a fine distinction, the Court made clear that the language at issue necessitated that the distinction be drawn. *Great-West* 122 S. Ct. at 715, 717.

Here, the plaintiffs' original suit was for legal restitution, a kind of relief rendered unattainable by *Great-West.* They now seek to establish a constructive trust, however, and ultimately to compel its transfer to them, a form of relief explicitly authorized by *Great-West. Great-West* 122 S. Ct. at 714. Pursuant to a stipulation, defense counsel has agreed to hold the funds, making the money sought traceable to particular funds in the defendant's possession. *Id.* Thus, this seems to be the precise situation allowed in *Great-West*, and other courts in similar situations have also recognized as much by allowing ERISA plans to seek the relief plaintiffs here seek. *See, e.g., Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco,* 2002 U.S. Dist. LEXIS 530, 2002 WL 47159 (N.D. Ill. Jan. 14, 2002). Therefore, the Court must conclude that *Great-West* has no effect on its earlier ruling other than to change the form of relief granted and the equitable basis of such relief.

Defendant's brief on the effect of *Great-West* does not change this conclusion. Though he urges that the result

reached here is not, in fact, equitable in the sense of fairness, the Court cannot overlook the fact that the Supreme Court specifically suggested that transfer of a constructive trust is equitable relief under the rule of *Great-West*. Defendant also argues that a constructive trust is inappropriate because he has not been unjustly enriched or done something wrong; indeed, he will be left a debtor. The Court has previously made its sympathy for defendant's position clear, and this sympathy has not changed. However, the Court also previously rejected these arguments, and changing the form of relief pursuant to *Great-West* does not change the Court's underlying analysis.

In conclusion, the Court has reconsidered its earlier summary judgment in light of *Great-West* and has reached the following conclusions. First, the form of relief previously authorized is now clearly impermissible, but this is cured by plaintiff's amended complaint, which seeks a constructive trust. Second, the Court does not change its essential analysis and conclusion that the plan language entitles plaintiffs to recover monies paid on behalf of defendant except to the extent the recovery from which those monies come is attributable to defendant's wife. Finally, the Court will not rule on any such apportionment until the issue is fully and properly before it.

IT IS SO ORDERED.

Dated this 22nd day of April, 2002.

RODNEY S. WEBB, CHIEF JUDGE
UNITED STATES DISTRICT COURT

2002 U.S. DIST. LEXIS 24168

PAUL ALLISON, Plaintiff, vs. WELLMARK, INC., d/b/a BLUE CROSS AND BLUE SHIELD OF IOWA, Defendant.

No. C00-3015-MWB

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

October 15, 2002, Decided

COUNSEL: For Paul J. Allison, PLAINTIFF: Raymond P. Drew, Drew Law Firm, Hampton, IA USA.

For Paul J. Allison, PLAINTIFF: Tom L. Drew, Lawyer Lawyer Dutton Drake, West Des Moines, IA USA.

For Wellmark, Inc., DEFENDANT: David M. Swinton, Ahlers Cooney Dorweiler Haynie Smith & Allbee, Des Moines, IA USA.

JUDGES: Judge: Mark W. Bennett, Judge.

OPINION BY: Mark W. Bennett

OPINION:

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO REMAND

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I. INTRODUCTION AND BACKGROUND

A. Procedural Background

On February 3, 2000, plaintiff Paul J. Allison filed a petition for declaratory judgment in the Iowa District Court In And For Franklin County seeking a declaration that defendant Wellmark, Inc. d/b/a Blue Cross and Blue Shield of Iowa ("Wellmark") had no right of subrogation to the proceeds of plaintiff Allison's underinsured motorist coverage. Defendant Wellmark removed this case to this court on February 18, 2000, pursuant to 28 U.S.C. § 1441. On February 28, 2001, defendant Wellmark filed its answer and prayed for a declaration from the court that Wellmark's subrogation rights extend to plaintiff Allison's underinsured motorist coverage.

On April 12, 2001, plaintiff Allison filed his Motion For Summary Judgment and defendant Wellmark filed its Motion For Partial Summary Judgment. The parties' cross-motions for summary judgment centered on the central issue in this case, whether defendant Wellmark is entitled to subrogation of plaintiff Allison's right to recovery of underinsured motorist coverage proceeds.

On July 30, 2001, after oral arguments on the parties' cross-motions for summary judgment, the court concluded that Wellmark's interpretation of the Plan's subrogation provision was not unreasonable. Thus, the court concluded that defendant Wellmark was entitled to subrogation of plaintiff Allison's right to recovery of underinsured motorist coverage proceeds and granted Wellmark's Motion for Partial Summary Judgment and denied Allison's Motion for Summary Judgment. This ruling would have been the final judgment in the case but for the fact that Wellmark did not seek summary judgment on the question of whether it owed Allison a reasonable attorney's fee in connection with his recovery of the underinsured motorist proceeds at issue in this litigation.

On January 8, 2002, the United States Supreme Court issued its decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002).[1] On March 1, 2002, in light of the *Knudson*

[1] In *Knudson,* the Court addressed the issue of the extent to which ERISA authorizes a plan administrator to enforce a plan's reimbursement provision. Janette Knudson, a beneficiary of an ERISA-governed employee welfare benefit plan, was severely injured in a car accident. 122 S. Ct. at 711. She was covered by an employee benefit plan. The plan included a reimbursement provision similar to the one at issue in the present case; the provision stated that the plan had " 'the right to recover from the [beneficiary] any payment for benefits' paid by the Plan that the beneficiary is entitled to recover from a third party." *Id.* Knudson filed a state tort suit against the manufacturer of the car in which she was riding and other tortfeasors. The parties subsequently negotiated a settlement and the tortfeasors paid the settlement money into a Special Needs Trust and gave the remainder to Knudson's attorney, who tendered a check in the amount of $13,828.70 to Great-West. Instead of cashing its check, however, Great-West filed suit, under ERISA § 502(a)(3), seeking to enforce the reimbursement provision of the plan and recover from the settlement proceeds the $411,157.11 it had paid

(Continued on following page)

decision, Wellmark requested that it be granted leave to amend its answer to include a request for the imposition of a collective trust on the proceeds of the underinsured motorist coverage and an award of interest. On July 1, 2002, the court found that Wellmark had established good cause to amend its answer to take the change in the decisional law into account and granted Wellmark's request for leave to amend its answer.

On August 29, 2002, defendant Wellmark filed its Motion for Partial Summary Judgment. In its motion, defendant Wellmark seeks summary judgment on the issue of its entitlement to imposition of a constructive trust. Plaintiff Allison filed a timely response to defendant Wellmark's motion in which he argues that the circumstances of this case do not establish Wellmark's entitlement to a constructive trust under Iowa law. Allison also argues that the court lacks subject matter jurisdiction over this matter.

On September 13, 2002, Plaintiff Allison filed a motion to remand which is grounded on his argument that the court does not have subject matter jurisdiction over this matter. Defendant Wellmark filed a timely response to Allision's motion to remand in which it asserts that because plaintiff Allison's claims are completely preempted by

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for Knudson's medical treatment. The Supreme Court held that ERISA § 502(a)(3) did not authorize the action because the plan was seeking legal relief. 122 S. Ct. at 719. The Court, however, suggested that if the plan administrator had been seeking an equitable lien on particular property in the hands of the plan beneficiary, such a suit would sound in equity and would be authorized by § 502(a)(3). 122 S. Ct. at 714-15.

ERISA, the court has subject matter jurisdiction over the case.

The court heard telephonic oral arguments on defendant Wellmark's Motion for Partial Summary Judgment on October 8, 2002. At the oral arguments, plaintiff Allison was represented by counsel Raymond P. Drew of Drew Law Firm, Hampton, Iowa. Defendant Wellmark was represented by counsel David Swinton of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, Iowa.

The court turns first to a discussion of the undisputed facts as shown by the record and the parties' submissions, then to consideration of the standards applicable to the motion for summary judgment, and, finally, to the legal analysis of whether defendant Wellmark is entitled to summary judgment on the issue of its entitlement to imposition of a constructive trust. The court will then address plaintiff Allison's motion to remand.

B. Factual Background

The record reveals that the following facts are undisputed. Plaintiff Paul J. Allison was an employee of the Curries Company on June 3, 1990. As an employee of the Curries Company, Allison had health care benefits through the Curries Company health benefits plan ("The Plan"). The Plan is self-funded by the Curries Company and is maintained pursuant to an Alliance Select Benefit Certificate. Defendant Wellmark provides certain administrative services and stop-loss coverage to the Curries Company with respect to the Plan pursuant to an Administrative Services and Financial Agreement. The Plan is an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001

et seq. ("ERISA"). Plaintiff Allison was furnished with a copy of the Plan.

On June 3, 1999, plaintiff Allison was severely injured in an automobile accident. Plaintiff Allison was a passenger in the automobile at the time of the accident. The accident was caused by the driver of the automobile in which Allison was a passenger. The driver of the automobile carried automobile insurance with the Hartford Insurance Company with a liability limit of $10,000. Plaintiff had automobile insurance with the Prudential Insurance Company which provided underinsured motorist coverage in the amount of $100,000.

As a result of the injuries sustained in the accident, plaintiff Allison incurred medical expenses in excess of $135,000. Plaintiff Allison's total damages for injuries sustained in the accident exceed the amount of automobile insurance coverage available to him. Following the accident, Allison made a demand on the Prudential Insurance Company for the limits of his underinsured motorist coverage. The Prudential Insurance Company subsequently paid to Allison underinsured motorist benefits in the amount of $100,000.

Defendant Wellmark has paid $126,067.17 in benefits for the medical expenses incurred by Allison as a result of the accident. The Plan contains the following provision with respect to subrogation:

> **. SUBROGATION**
>
> Once you receive benefits under this certificate arising from an illness or injury, we will assume any legal right you have to collect compensation, damages, or any other payment related to the

illness or injury, including benefits from any of the following:

. The responsible person's insurer.

. Uninsured motorist coverage.

. Underinsured motorist coverage

. Other insurance coverage.

You and your family agree to all of the following:

. You will let us know about any potential claims or rights of recovery related to the illness or injury.

. You will furnish any information and assistance we determine we will need to enforce our rights under this certificate.

. You will do nothing to prejudice our rights and interests.

. You will not compromise, settle, surrender, or release any claim or right of recovery described above, without getting our written permission.

. You must reimburse us to the extent of benefit payments made under this certificate if payment is received from the other party or parties.

You and your covered family member(s) must notify us if you have the potential right to receive payment from someone else. You must cooperate with us to ensure that our rights to subrogation are protected.

> We reserve the right to offset any amounts owed to us against any future claim settlement amounts.

Curries Company Alliance Select Health Benefits Certificate, Def.'s Ex. C at pp. 46-47. Wellmark first corresponded with Allison regarding its subrogation rights no later than August 30, 1999. In response to Wellmark's letter of August 30, 1999, Allison's counsel wrote to Wellmark on September 9, 1999. Allison's counsel's letter of September 9, 1999, does not mention the possibility of recovery under an underinsured motorist policy. On October 12, 1999, Wellmark wrote to Allison and his counsel. Wellmark advised both Allison and his counsel that Wellmark had a right of subrogation to the proceeds of underinsured motorist coverage and requested that Wellmark be kept informed of any settlement negotiations. On September 20, 1999, a check was issued to Allison from his automobile insurance carrier for his underinsured motorist coverage.

On October 19, 1999, Allison's counsel wrote to Wellmark, advising it that Allison had underinsured motorist coverage in the sum of $100,000. Allison's counsel did not inform Wellmark that the proceeds of that coverage had already been paid out. Allison's counsel indicated that it was his position that Allison's underinsured motorist coverage was not subject to subrogation. He requested that Wellmark provide him with any Iowa legal authority supporting its position that its right of subrogation extended to Allison's underinsured motorist coverage. On November 16, 1999, Wellmark wrote to Allison's counsel to advise him of the amount of benefits paid by Wellmark as of that date. On December 20, 1999, Wellmark responded to Allison's counsel's request to be supplied with legal

authority supporting its position that its right of subrogation extended to Allison's underinsured motorist coverage. There was no further correspondence between the parties prior to February 3, 2000, when plaintiff Allison filed the present case. On March 9, 2000, in a letter from Allison's counsel, Wellmark was advised for the first time that the proceeds of Allison's underinsured motorist coverage had been paid out to him.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Fed. R. Civ. P. 56 in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo,* 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.,* 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill,* 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.,* 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part,* 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 61 (2000); *Tralon Corp. v. Cedarapids, Inc.,* 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.,* 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.,* 963 F. Supp. 805 (N.D. Iowa 1997). Thus, the court will not consider those standards in detail here. Suffice it to say that Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to

> obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(a)-(c) (emphasis added). Applying these standards the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct 2505 (1986); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377. With these standards in mind, the court turns to consideration of defendant Wellmark's Motion for Partial Summary Judgment.

B. Analysis Of Wellmark's Motion For Partial Summary Judgment

1. Subject matter jurisdiction

The court will initially take up plaintiff Allison's argument that the court lacks subject matter jurisdiction over this case. Thus, as a threshold issue this court must determine whether removal was appropriate. If it was not, the court does not have subject matter jurisdiction and the court must deny as moot defendant Wellmark's Motion For Partial Summary Judgment. A civil action is removable if the district court has "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b). It is uncontested that plaintiff Allison has pleaded only a state

law claim for declaratory judgment. As the Eighth Circuit Court of Appeals has observed:

> Under the "well-pleaded complaint" rule, "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint." *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 14, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). However, the well-pleaded complaint rule does not apply if Congress has evidenced an intent that federal law completely displace state law. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987).

Lyons v. Philp Morris Inc., 225 F.3d 909, 912 (8th Cir. 2000). Thus, under application of the complete preemption doctrine, because state common law claims are deemed to be recast as federal claims, the preempted state law claims give rise to federal question jurisdiction, and, as a result, provide a basis for removal. *Id.*

In *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 95 L. Ed. 2d 55, 105 S. Ct. 1542 (1987), the Supreme Court held that the "complete preemption" exception applies to § 1132(a) of ERISA, 29 U.S.C. § 1132(a), which is ERISA's civil enforcement scheme. *Id.* at 67; *see Lyons,* 225 F.3d at 912. Thus, a state-law claim seeking the sort of relief provided for in § 1132(a) is essentially transformed into a claim which is "federal in character" and which will support removal jurisdiction. *Metropolitan Life Ins. Co.,*

481 U.S. at 67; *Lyons,* 225 F.3d at 912. The question, then, is whether plaintiff Allison's state-law claim for declaratory relief falls within the scope of ERISA § 1132(a). Thus, if Allison could have brought his claim under ERISA § 1132(a), the claim must be deemed to be completely preempted, and the court is correct to exercise jurisdiction here.

Section 1132(a), in relevant part, provides:

> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title . . .

29 U.S.C. §§ 1132(a)(1)-(4).

The Eighth Circuit Court of Appeals has held that a fiduciary's claim against a plan beneficiary for specific performance of the plan's subrogation clause falls within § 502(a)(3)'s exclusive jurisdiction over suits to enforce the terms of the plan. *See Southern Council of Indus. Workers v. Ford,* 83 F.3d 966, 969 (8th Cir. 1996); *see also Lyons,* 225 F.3d at 912 (holding that plan fiduciaries' subrogation claims against tobacco companies for recovery of costs incurred due to tobacco related illnesses fells within § 502(a)(3)'s exclusive jurisdiction over suits to enforce the terms of the plan). In its *Ford* decision, the Eighth Circuit Court of Appeals considered whether subject matter jurisdiction existed over a claim by an ERISA plan to enforce the terms of a subrogation clause. *Ford,* 83 F.3d at 967-68. The Southern Council of Industrial Workers and the Southern Council of Industrial Workers Trust Fund ("Southern Council") maintained an employee benefit plan that provided health insurance. *Id.* at 967. The plan contained a subrogation clause providing that Southern Council would be subrogated to the rights of a beneficiary to receive or claim indemnification from a third party. *Id.* at 967-68. A beneficiary to the plan, Jacqueline Ford ("Ford") sustained injuries from a fall at a supermarket. After the plan paid $39,971.35 in medical benefits on Ford's behalf, Ford brought suit against the supermarket and eventually obtained a settlement of $150,000 from the supermarket's insurer. *Id.* at 968. Prior to the settlement, Ford and her attorney signed a subrogation agreement providing that they would reimburse the plan from the proceeds of any recovery for Ford's injuries. *Id.* After Ford and her attorney paid the fund only $10,000 in reimbursement for the benefits paid on Ford's behalf, Southern Council brought suit against Ford and her attorney seeking to recover the balance of the amounts it had paid on Ford's

behalf. *Id.* The district court ruled that there was no cognizable claim under ERISA for Southern Council's recovery of benefits paid on Ford's behalf. *Id.* The Eighth Circuit reversed, finding that Southern Council alleged an ERISA cause of action under § 1132(a)(3) to obtain equitable relief. *Id.* "Southern Council's allegation that Ford admittedly failed to reimburse it as required by the subrogation clause is a claim that Ford failed to comply with a term of the plan. Southern Council sought specific performance of Ford's obligation under the subrogation clause." *Id.* (citations omitted).

Although the *Ford* decision involved a plan's lawsuit against a plan beneficiary to enforce a plan's subrogation clause while this case involves a lawsuit brought by a plan beneficiary against the plan for declaratory relief that the plan has no right of subrogation to the proceeds of underinsured motorist coverage under its terms, the court concludes that this difference does not eliminate § 1132(a)(3) jurisdiction over this case. Here, plaintiff Allison is seeking to redress what he believes is a violation of the terms of the plan with respect to its right of subrogation. Such a claim falls squarely within the framework of §§ 1132(a)(1) and 1132(a)(3)(A).

Plaintiff Allison does not address the *Ford* decision in his moving papers. Rather, plaintiff Allison's argument that subject matter jurisdiction is lacking here is grounded on the Fifth Circuit Court of Appeals's recent decision in *Arana v. Oschner Health Plan, Inc.*, 302 F.3d 462, 2002 WL 1878714 (5th Cir. Aug. 15, 2002). In *Arana,* a dependent of a plan beneficiary, Arana, was severely injured in an automobile accident. The defendant, Ochsner Health Plan, Inc. ("OHP") provided health benefits to participants and beneficiaries of the plan pursuant to a Group Health

Services Agreement ("GHSA") between OHP and the employer. 302 F.3d 462, 2002 WL 1878714 at *1. After the automobile accident, Arana's health care providers submitted to OHP claims for services rendered to Arana, and OHP paid approximately $180,000 in health benefits for treatment of Arana's accident-related injuries. *Id.* Four automobile insurance policies provided coverage for the accident. Arana subsequently settled claims under the four policies for a total of $1,112,500. After receiving notification from OHP that claimed a contractual right to reimbursement of the health benefits it had paid on Arana's behalf, Arana filed suit against OHP in the Louisiana state district court. 302 F.3d 462, 2002 WL 1878714 at *2. In his state court petition, Arana requested a declaratory judgment "requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement, and assignment claims" against him. Arana asserted that such claims violated La. Rev. Stat. 22:663. OHP removed Arana's lawsuit to the Eastern District of Louisiana, on the grounds that the petition asserts claims that were completely preempted by ERISA. OHP then filed a motion to dismiss or, alternatively, a motion for summary judgment. In response to OHP's motion to dismiss, Arana asserted that subject matter jurisdiction was lacking. 302 F.3d 462, 2002 WL 1878714 at *2, n.4.

The district court concluded that Arana's petition stated a claim for benefits under 29 U.S.C. § 1132(a) that was completely preempted by ERISA. In reversing, the Fifth Circuit Court of Appeals concluded that Arana's claim was not one for benefits under § 1132(a). 302 F.3d 462, 2002 WL 1878714 at *4. The court of appeals also concluded that Arana's cause of action under La.Rev.Stat. 22:663 was not within the scope of § 1132(a) as an action

"to enforce his rights under the terms of the plan." *Id.* In reaching this conclusion, the court of appeals noted that, because the terms of the plan were not of record, it was not persuaded that Arana was seeking a declaration that Louisiana state law controlled over plan provisions. The court went on to observe:

> Moreover, assuming arguendo that the terms of the GHSA are properly considered to be the terms of the LeCler plan, such an assumption still does not justify characterizing Arana's claim as one to enforce the plan's terms. Arana does not dispute that the GHSA affords OHP the subrogation and reimbursement rights it claims. Arana in fact concedes that he would owe a portion of his tort recovery to OHP if the terms of the GHSA were enforced, but he argues that the relevant provisions in the GHSA are illegal by operation of 22:663. Although Arana's suit to enforce state law over the terms of the plan may be "akin" to a suit to enforce the terms of the plan itself, the fact that a claim is akin to a cause of action authorized under section 502(a) is not enough to support a federal claim under ERISA.

302 F.3d 462, 2002 WL 1878714 at *5.

The *Arana* decision is distinguishable from the present case. In contrast to the petition involved in *Arana,* plaintiff Allison's petition does not assert that Wellmark's right to subrogation under the plan is unenforceable under state law. Instead, plaintiff Allison asserts that the plan does not provide for subrogation, and that the plan "is ambiguous in its terms as to what, if any, claims the Defendant could legally claim under the facts of this case." Complaint at ¶¶ 8-9. Moreover, plaintiff Allison expressly sought "a declaratory judgment construing the insurance

policy of the defendant and declaring that said defendant has no subrogation rights under the underinsured benefits of Plaintiff's automobile policy." Complaint at p. 2. Thus, Allison, unlike the plaintiff in *Arana,* is seeking an interpretation of the plan and a declaration of his rights under the plan. Such a prayer for relief falls squarely within the scope of §§ 1132(a)(1) and 1132(a)(3)(A). Therefore, the court concludes that plaintiff Allison's claims are completely preempted by ERISA and the court has subject matter jurisdiction to hear this matter.

2. Constructive trust

The court turns next to consider whether a constructive trust is available to protect the plan where a plan's beneficiary has obtained funds which are subject to subrogation.

The issue of whether a constructive trust is available under the facts of this case must be determined by application of federal common law. The federal common law in turn, may draw guidance from analogous state law. *See Wegner v. Standard Ins. Co.,* 129 F.3d 814, 818 (5th Cir. 1997); *Jones v. Georgia Pacific Corp.,* 90 F.3d 114, 116 (5th Cir. 1996); *Todd v. AIG Life Ins. Co.,* 47 F.3d 1448, 1451 (5th Cir. 1995); *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321, 1325 (5th Cir. 1994); *Heasley v. Belden & Blake Corp.,* 2 F.3d 1249, 1257 (3d Cir. 1993); *McMillan v. Parrott,* 913 F.2d 310, 311 (6th Cir. 1990). A constructive trust is "an equitable remedy compelling a person who has property to which he is not justly entitled to transfer it to the person entitled." *United States v. Pegg,* 782 F.2d 1498, 1499 (9th Cir. 1986). A constructive trust is among the remedies available to a court of equity and is therefore

available under 29 U.S.C. § 1132(a)(3), as means by which to compel restitution to an ERISA plan. *See Mertens v. Hewitt Assocs.,* 508 U.S. 248, 250, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993); *Amalgamated Clothing & Textile Workers v. Murdock,* 861 F.2d 1406, 1413 (9th Cir. 1988).

Under Iowa law, a constructive trust is an equitable remedy and is appropriate in three instances: actual fraud, constructive fraud, or equitable principles other than fraud. *See Koster v. City of Davenport,* 183 F.3d 767, 769 (8th Cir. 1999); *Berger v. Cas' Feed Store, Inc.,* 577 N.W.2d 631, 632 (Iowa 1998); *In re Estate of Peck,* 497 N.W.2d 889, 890 (Iowa 1993); *Slocum v. Hammond,* 346 N.W.2d 485, 493 (Iowa 1984); *Regal Ins. Co. v. Summit Guar. Corp.,* 324 N.W.2d 697, 704 (Iowa 1982); *Loschen v. Clark,* 256 Iowa 413, 419, 127 N.W.2d 600, 603 (1964); *see also In re Marriage of Jones,* 451 N.W.2d 25, 26 (Iowa Ct. App. 1989). "Other circumstances supporting imposition of equitable principles include bad faith, duress, coercion, undue influence, abuse of confidence, or any form of unconscionable conduct or questionable means by which one obtains the legal right to property which they should not in equity and good conscience hold." *In re Estate of Welch,* 534 N.W.2d 109, 111 (Iowa Ct. App. 1995). "The party who seeks the imposition of a constructive trust must establish the right by clear, convincing, and satisfactory evidence." *Neimann v. Butterfield,* 551 N.W.2d 652, 654 (Iowa Ct. App. 1996); *see Slocum,* 346 N.W.2d at 493; *In re Estate of Welch,* 534 N.W.2d at 111; *James v. James,* 252 Iowa 326, 330, 105 N.W.2d 498 (1960); *see also In re Estate of Farrell,* 461 N.W.2d 360, 361 (Iowa Ct. App. 1990).

Wellmark concedes that Allison is not guilty of actual or constructive fraud under the first two grounds. Rather, it argues that the third ground is applicable because it is

inequitable for Allison to retain the proceeds of the underinsured motorist coverage in light of the plan's subrogation provision and this court's prior determination that Wellmark is entitled to the underinsured motorist coverage proceeds under the subrogation provision. Given that the court has previously determined that Wellmark is entitled to the underinsured motorist coverage proceeds pursuant to the plan's subrogation provision, the court concludes that equity requires the imposition of a constructive trust on the insurance proceeds at issue in this case. Therefore, the court grants defendant Wellmark's Motion For Partial Summary Judgment and orders that the underinsured motorist coverage proceeds are to be held in constructive trust for Wellmark.

C. Allison's Motion To Remand

In his motion to remand, Allsion asserts that this matter should be remanded to state court because this court lacks subject matter jurisdiction. Allison reiterates the jurisdictional arguments he raised in his resistance to Wellmark's motion for partial summary judgment. For the reasons discussed above, the court concludes that plaintiff Allison's claims are completely preempted by ERISA, and, thus, the court has subject matter jurisdiction here. Therefore, plaintiff Allison's motion to remand is denied.

III. CONCLUSION

The court concludes that Allison's claims for relief fall within the scope of §§ 1132(a)(1) and 1132(a)(3)(A). Therefore, the court concludes that plaintiff Allison's claims are completely preempted by ERISA, and the court has subject matter jurisdiction over the case. The court further

concludes that, in light of the fact that this court previously determined that Wellmark is entitled to the underinsured motorist coverage proceeds pursuant to the plan's subrogation provision, equity requires the imposition of a constructive trust on the insurance proceeds at issue in this case. Therefore, the court grants defendant Wellmark's Motion For Partial Summary Judgment and orders that the underinsured motorist coverage proceeds are to be held in constructive trust for Wellmark.

Because the court concludes that it has subject matter jurisdiction over this matter, Allison's motion to remand is denied.

It appears to the court that the only matter left unresolved in this litigation is the question of whether Wellmark owes Allison a reasonable attorney's fee in connection with his recovery of the underinsured motorist proceeds at issue in this case. The parties are urged to attempt to resolve this issue amongst themselves in order to expedite the entry of a final judgement and the filing of any appeals the parties may wish to take in this case. To that end, the parties are directed to confer within the next month in an attempt to resolve the fee issue amongst themselves. The parties shall file a status report **not later than November 15, 2002**, addressing whether the parties have been able to resolve the fee issue and the need for the court to hold a bench trial on the fee issue.

IT IS SO ORDERED.

DATED this 15th day of October, 2002.

Judge: Mark W. Bennett

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WESTAFF (USA), INC., a California corporation d/b/a Western Staff Services, as Administrator of the WESTERN STAFF SERVICES EMPLOYEE HEALTH PLAN, Plaintiff, v. BETTY ARCE, a single woman, Defendant.	No. CIV '99 1222 PHX ROS **COMPLAINT** (Filed Jul. 7, 1999)

1. Plaintiff is a corporation created and existing under the laws of the State of California.

2. Defendant is a citizen of the State of California.

3. Plaintiff is the Administrator of the Western Staff Services Employee Health plan ("the Plan"), an Employee Welfare Benefit Plan within the meaning of Employee Retirement Income Security Act ("ERISA"), 29

U.S.C. § 1002(1). Among other things, the Plan provides medical benefits for employees of the Plaintiff, and their dependents.

4. This court has jurisdiction of the matter pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

5. Plaintiff has standing to bring this action pursuant to 29 U.S.C. § 1132(a)(3).

6. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) as the Plan is administered in this District through TPA of Arizona, Inc.

7. Defendant was an employee of Plaintiff. Defendant was "a covered person" under the terms and conditions of the Plan.

8. On or about November 19, 1997, Defendant was involved in an automobile accident which caused physical injury to her.

9. The ERISA benefit plan established and maintained by the Plaintiff paid medical expenses on behalf of Defendant in excess of $30,000.00.

10. The Plan, a portion of which is attached hereto as Exhibit 1, provides, among other things:

> . . . Accepting benefits under this Plan for those incurred medical or dental expenses automatically assigns to the Plan any rights the Covered Person may have to recover payments from any third party or insurer. This subrogation right allows the Plan to pursue any claim which the Covered Person has against any third party, or insurer, whether or not the Covered Person chooses to pursue that

> claim. The Plan may make a claim directly against the third party or insurer, but in any event, the Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full. . . .

11. On or about February 5, 1998, Defendant executed a Reimbursement Agreement with Plaintiff, a true and correct copy of which is attached hereto as Exhibit 2. By that Reimbursement Agreement, Defendant agreed that in accordance with provisions of the Employee Benefit Plan, she agreed to reimburse and pay promptly to Plaintiff an amount from any recovery from third persons which amount was necessary to repay the benefits paid.

12. The Reimbursement Agreement further provides that Defendant would pay all attorneys' fees and costs incurred by Plaintiff in pursuing any rights under the Agreement.

13. Defendant has pursued a claim for personal injury against a third party. The third party has tendered $15,000 in satisfaction of the claim. The $15,000 is being held in a trust account.

14. Plaintiff and Defendant have attempted, but have failed to reach an agreement regarding the $15,000 and the Plaintiff's subrogation and reimbursement rights.

15. There is a controversy existing among the parties regarding the rights and responsibilities of the parties under the Plan and Reimbursement Agreement.

WHEREFORE, Plaintiff prays for judgment as follows:

1. Adjudicating the rights and liabilities of the parties hereto with respect to the obligations of reimbursement and subrogation under the Plan and the Reimbursement Agreement;

2. That an order issue requiring the specific performance of the Plan and the Reimbursement Agreement.

3. Such other and further relief the court deems just and proper.

RESPECTFULLY SUBMITTED this 7th day of July, 1999.

NORLING, KOLSRUD,
SIFFERMAN & DAVIS, P.L.C.

By /s/ Mark S. Sifferman
Mark S. Sifferman

2002 U.S. DIST. LEXIS 1697

HOTEL & RESTAURANT & BAR EMPLOYEES FRINGE BENEFIT FUNDS, Plaintiff, v. Mui Trong, as mother and natural guardian of Peter Truong, Defendant.

Civil File No. 01-873 (MJD/RLE).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

January 31, 2002, Decided

COUNSEL: For HOTEL & RESTAURANT & BAR EMPLOYEES FRINGE BENEFIT FUNDS, plaintiff: Thomas F Andrew, Aaron Robert Bransky, Brown Andrew Signorelli & Zallar, Duluth, MN.

For MUI TRUONG, defendant: Mark Leslie Knutson, Boyd Agnew Dryer & Storaasli, Duluth, MN

JUDGES: Michael J. Davis, United States District Court Judge.

OPINION BY: Michael J. Davis

OPINION:

MEMORANDUM AND ORDER

This matter is before the Court on the parties' cross-motions for summary judgment. For the reasons that follow, the Court grants Defendant's motion and denies Plaintiff's motion.

BACKGROUND

The parties have stipulated to the following facts. Minor Peter Truong was born on December 31, 1986. His

mother is Mui Trong ("Defendant"). Peter and Mui Truong are of Vietnamese and Chinese descent. Mui came to the United States as an adult refugee. Mui's knowledge of English is very limited. She must use a translator for her legal matters and other important affairs. On August 6, 1993, Peter was 6 years old. He lived at 326 South 16th Avenue East in Duluth, Minnesota. Down the hill from his residence is a street called "South Street," which abuts the freeway in that area. On the morning of the accident, Peter left his house and crossed the Avenue to try to play with some friends. He was not able to do so, and played in the yard adjoining South Street between 16th Avenue East and 15th Avenue East. At some point, he noticed a troll doll across the street from him. He then entered South Street to retrieve the doll. As he did so, he was struck by a garbage truck driven by James King Hall, Jr., and owned by TGR Sanitary Services of Duluth, Minnesota.

There are various disputes regarding how the accident occurred, including among other matters, the visibility of the driver and whether the driver should have anticipated Peter's entry into the street. When Peter was struck by the garbage truck, his right foot was dragged along the pavement by the truck's wheel for a distance of some feet. The skin and other soft tissues were abraded from the top of his foot.

As a result of this accident, Peter has had several surgeries. The top of his foot remains severely disfigured by a graft of skin and fat which was placed there to replace the damaged tissue. Although he can run and walk without a dramatic limp, he still does not quite have a normal gait. He has scars on his thigh and his back from the donor sites of the grafts which were used on his foot. His impairments affect his activities. He claims to have

emotional distress as a result of this disfigurement. It appears that further surgery may be required on his foot as his foot grows and he matures.

Following mediation, a settlement has been reached with the driver, the sanitary service and its insurer, State Farm Insurance. The amount of the settlement is $150,000.00. There has been a Petition filed for approval of the settlement in Minnesota District Court in the Sixth Judicial District in Duluth, Minnesota. The Petition for settlement includes payment to Mui Truong and some sums from that settlement, payment of attorney's fees and costs of the settlement, and placement of the remainder of the settlement either in a Settlement Preservation Trust for Peter Truong, or payment by way of a Structured Settlement.

Pursuant to an agreement between the Plaintiff and Defendant in this matter, $30,000.00 of the $150,000.00 settlement has been placed in an interest-bearing Escrow Account with Boyd Agnew Dryer & Storaasli, Ltd., attorneys for the Truongs, pending resolution of the underlying lawsuit.

The parties agree that the Truongs have not been fully compensated by this settlement. The medical expenses for Peter related to this accident and injuries sustained on August 6, 1993, exceed $45,000.00. Of those medical expenses, the garbage truck's No-Fault Insurance paid $20,000.00. Mui herself has paid for some of the medical expenses not covered by the insurance. The Hotel & Restaurant & Bar Employees Fringe Benefit Funds also paid $25,012.14 in medical benefits. The Hotel Plan claims a subrogation interest in the sum of $25,012.14 in the settlement proceeds. The Truongs deny that the Plan has

a valid subrogation interest in that sum. The dispute between the parties regards the nature and priority of any subrogation interest, not regarding its amount, if there is a subrogation interest in the settlement proceeds.

Plaintiff Hotel & Restaurant & Bar Employees Fringe Benefit Funds ("Funds") is a multi-employer, jointly-trusted fringe benefit plan created and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), as amended (29 U.S.C. § 186(c)(5)). The Fund is administered in accordance with the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended (29 U.S.C. § et seq.), and is exempt from federal income taxation pursuant to Internal Revenue Code Section 501(c)(9). The Fund is governed by and administered pursuant to the terms of the Agreement and Declaration of Trust establishing the trust fund ("Trust Agreement") and a Plan Document and Summary Plan Description ("Plan"). An employee of an Asian restaurant in Duluth, Minnesota, Mui was a participant in the Fund as provided under the terms of the Trust Agreement and Plan. The Fund also provided coverage for Peter as Mui's dependent.

On January 4, 1994, Mui signed a "Request for Payment and Subrogation Assignment" at the request of the Plan. That form was given to Mui by the Plan with the instruction that she had to sign the form before the Plan would pay medical bills relating to the accident. The Plan claims that the Plan and Plan terms that were in effect on the date of the accident of August 6, 1993, specifically the relevant subrogation language, are contained in Paragraph X11, pages 39 and 40 of the Plan. The Plan represents that there were no intervening Plans or changes in language regarding the subrogation provisions between

August 6, 1993 and the present time, apart from the changes indicated in the July 1, 1999 Plan. Mui claims that she did not receive a copy of the Plan before the time of the accident or before the time she signed the "Request for Payment and Subrogation Assignment" on January 4, 1994. Mui asserts that the only notice of the nature of Plaintiff's subrogation interest before Spring 2001, was the notice given in the "Request for Payment and Subrogation Assignment" executed on January 4, 1994. The Plan represents that it believes Mui was given a copy of the Plan before those times.

On May 7, 2001, Mui, on behalf of Peter, submitted for filing a Petition for Approval of the Settlement to a state court administrator. She also filed in state court a Notice of Motion and Memorandum to allow settlement without payment of the subrogation interest, and served a copy on the Plan. On May 18, 2001, the Plan filed the underlying action in federal court. Both parties have moved for summary judgment and waived oral argument. The Court sought additional briefing from the parties in light of the Supreme Court's recent decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, 2002 WL 15399 (2002).

DISCUSSION

A. Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.,* 980 F.2d 1217, 1219-20 (8th Cir. 1992). As the

United States Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex,* 477 U.S. at 327 (quotation omitted).

B. ERISA § 502(a)(3)

Citing the recent Supreme Court decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, 2002 WL 15399 (2002) and reiterating arguments made in her motion for summary judgment, Defendant argues that the underlying action was not properly commenced pursuant to ERISA because Plaintiff, the fiduciary, seeks legal not equitable relief. To the extent that Defendant characterizes this issue as dispositive of this case, the Court will assume that Defendant has waived her argument for *Younger* abstention. Plaintiff argues that the underlying action properly states a claim because the parties signed a Stipulation on June 22, 2001, agreeing that:

> 11. Jurisdiction of this action is based on § 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(e)(1), conferring jurisdiction on the District Courts to hear civil actions brought by a fiduciary pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).
>
> 12. Venue is appropriate in this District Court pursuant to § 502(e)(2) of ERISA, 29 U.S.C. § 1132(3)(2) in that this is the District in which the Fund is administered.

(Stipulation ¶¶ 11 and 12).

> The Court disagrees with Plaintiff's reasoning. ERISA § 502(a)(3) authorizes a civil action:
>
> > . . . by a . . . fiduciary (A) to **enjoin** any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate **equitable** relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan.

29 U.S.C. § 1132(a)(3) (emphasis added). Plaintiff's Complaint contains two counts: (1) Count 1 for Violation of Plan Terms; and (2) Count 2 for Attorney's Fees. (Compl. at 4.) In Count I, Plaintiff seeks reimbursement of $25,012.14 "as a result of Mui Truong's breach of the terms of the Plan." (Compl. ¶ 20.) In the prayer for relief, in addition to attorney's fees, Plaintiff seeks "an award of $25,012.14 in **damages**." (*Id.* at 5, ¶ 1) (emphasis added). On the face of the Complaint, Plaintiff asserts no claim to enjoin a practice or for equitable relief against Defendant.

Recently in *Great-West,* petitioners sought an injunction to compel the payment of money past due under the reimbursement provision of respondents' ERISA Plan, or alternatively, restitution for money past due. 534 U.S. 204, 122 S.Ct. 708, 151 L. Ed. 2d 635, 2002 WL 15399. The Supreme Court held that because petitioners in that case sought legal relief, or the imposition of personal liability on respondents for a contractual obligation to pay money, ERISA § 502(a)(3) did not authorize the action. 534 U.S. 204, at *9. Accordingly, the Supreme Court affirmed summary judgment in favor of respondents. *Id.* The Supreme Court made clear that:

> A claim for money due and owing under a contract is quintessentially an action at law. Almost

> invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty. And [m]oney damages are, of course, the classic form of legal relief.

122 S. Ct. at 713, at *4 (citations and quotations omitted). The Supreme Court discusses at length petitioner's claim for restitution and when such a claim may be characterized as an "equitable" versus a "legal" remedy. 122 S. Ct. 708 at *6-*9. *But see* 122 S. Ct. 708 at *10-*11 (Stevens, J., dissenting), *11-*18 (Ginsburg, J., dissenting.) However, this Court need not reach that issue or discuss that analysis at this time. Unlike the petitioners in *Great-West,* Plaintiff here has not pled an action for specific performance or restitution. In fact, Plaintiff has not sought "to enjoin" Defendant or "equitable" relief against Defendant at all. Plaintiff's Complaint quite plainly seeks money damages based on a contractual obligation, or legal relief.

Furthermore, the parties' Stipulation does not bear on this issue. Whether this Court has jurisdiction pursuant to ERISA § 502(e)(1) over claims arising under ERISA § 502(a)(3) is a separate and distinct question from whether a claim has been properly asserted under ERISA § 502(a)(3). The Court cannot construe the parties' Stipulation any broader than the language it contains, and that language does not waive argument on whether a claim has been properly asserted under ERISA § 502(a)(3). Accordingly, because Plaintiff in this case is seeking legal relief, Plaintiff has failed to state a claim under ERISA § 502(a)(3).

CONCLUSION

Based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Clerk Doc. No. 13) is **DENIED**; and

2. Defendant's Motion for Summary Judgment (Clerk Doc. No. 8) is **GRANTED** to the extent that Plaintiff has failed to assert a claim for equitable relief under ERISA § 502(a)(3).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 31, 2002

Michael J. Davis

United States District Court Judge

LATASHA OLIVER-PULLINS, Plaintiff, vs. ASSOCIATED MATERIAL HANDLING INDUSTRIES, INC., Defendant.

1:03-cv-0099-JDT-WTL

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

May 20, 2003, Decided

COUNSEL: For Latasha Oliver-Pullins, PLAINTIFF: Brenda F. Rodeheffer, Monday Rodeheffer Jones & Albright, Indianapolis, IN USA.

For Associated Material Handling Industries, Inc, DEFENDANT: Charmagne Topacio, Craig G Penrose, Tressler Soderstrom Maloney & Priess, Durga M Bharam, Tressler Soderstrom Malony & Priess, Chicago, IL USA.

For Associated Material Handling Industries, Inc, Counter CLAIMANT: Charmagne Topacio, Craig G Penrose, Tressler Soderstrom Maloney & Priess, Durga M Bharam, Tressler Soderstrom Malony & Priess, Chicago, IL USA.

JUDGES: John Daniel Tinder, Judge, United States District Court.

OPINION BY: John Daniel Tinder

OPINION:

ENTRY ON MOTION TO DISMISS COUNT THREE[1]

The Defendant moves the court to dismiss "Count III: ERISA Violation" of the Complaint for failure to state a claim. The motion is opposed by the Plaintiff.

Count III alleges in relevant part that the Plaintiff was employed by the Defendant and was discharged; she carried health insurance and other benefits through her employment, the use of which had the potential of increasing costs to the Defendant; her husband had a life threatening illness requiring the use of such benefits; and in terminating her employment, the Defendant was motivated by an effort to avoid the costs of providing a benefit under the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). The Complaint asks the court to find that the Defendant violated ERISA and seeks to recover the Plaintiff's lost income, including the value of lost benefits, compensatory damages, punitive damages, pre- and post-judgment interest, reasonable attorney's fees and costs, and all other appropriate relief.

The Defendant seeks dismissal of the Plaintiff's claim to the extent she seeks benefits under ERISA Section 502(a)(1)(B). The Plaintiff's response clarifies that her only ERISA claim is that the Defendant violation Section 510 by terminating her employment because of concerns

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[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

over what her husband's illness did or would do to its employee health insurance costs. Thus, the court understands that the Plaintiff does not assert a claim to benefits under 502(a)(1)(B) and such a claim is not in this case. This leaves only the Section 510 discharge claim brought under Section 502(a)(3). The Defendant contends that this claim should be dismissed because the relief requested is not recoverable under Section 502(a)(3).

The first question is whether the Defendant's motion ought to be treated as a motion to dismiss for lack of subject matter jurisdiction instead of a motion to dismiss for failure to state a claim. The asserted basis for this court's jurisdiction over Count III is federal question, 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e), in that the claim allegedly falls under ERISA Section 502(a)(3). (Compl.¶¶ 10, 11, 50.) A federal court has jurisdiction over an action authorized under Section 502(a). *See* 29 U.S.C. § 1132(e)(1); *Admin. Comm. v. Gauf,* 188 F.3d 767, 770 (7th Cir. 1999). A federal court lacks jurisdiction over a claim under Section 502(a)(3) seeking legal relief. *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 255-62, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993). So, the Defendant's motion should be treated as a motion to dismiss for lack of subject matter jurisdiction.

Thus, the second question is whether the court has subject matter jurisdiction over the claim asserted in Count III. The claim is brought under ERISA Section 502(a)(3) which provides:

> A civil action may be brought – . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the

> plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

29 U.S.C. § 1132(a)(3). Therefore, the answer to the second question hinges on whether Count III seeks equitable relief.

The Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), guides this court to the answer. *Great-West Life* reaffirmed *Mertens* in concluding that Section 502(a)(3) authorizes suits seeking equitable relief, not legal relief. *Id.* at 221. In that case, the respondent Janette Knudson was covered by an ERISA plan of her then-husband's employer. The plan covered $411,157.11 of her medical expenses resulting from a car accident, all except $75,000 of which was paid by the petitioner Great-West. The plan contained a reimbursement provision, the rights to which were assigned to Great-West. *Id.* at 207. Great-West sued under Section 502(a)(3) to enforce the plan's reimbursement provision by requiring the Knudsons to pay the plan $411,157.11 of any proceeds recovered from third parties. *Id.* at 208. The issue was whether Section 502(a)(3) authorized the action. *Id.* at 206.

The Supreme Court answered, "no." The Court first rejected the argument that the suit was authorized because the petitioners sought an injunction to compel the respondents to reimburse the plan. *Great-West Life,* 534 U.S. at 210. The Court reasoned that "an injunction to compel the payment of money past due under a contract or specific performance of a past due monetary obligation, was not typically available in equity." *Id.* at 210-11 (footnote omitted).

The Court next rejected the argument that the suit was authorized because Great-West sought restitution, which it argued was a form of equitable relief. The Court recognized that restitution can take the form of equitable or legal relief, *id.* at 212, 218, and explained that whether restitution was "legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Id.* at 213 (quotation omitted). Restitution was considered legal "[i]n cases in which the plaintiff could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him[.]" *Id.* (quotation omitted). A plaintiff's claim for restitution was legal in such cases "because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* (quotation omitted). The Court distinguished equitable restitution as follows:

> a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession . . . . Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West Life, 534 U.S. at 213-14 (citations omitted).

The Court concluded that Great-West sought legal restitution. This was based on the fact that Great-West claimed entitlement to funds which were not in the

respondents' possession. Thus, the Court reasoned: "The basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred." *Id.* at 214. Another determinative fact was that the petitioners did not seek to impose a constructive trust or equitable lien on particular property. *Id.* The Supreme Court therefore held that because Great-West was seeking legal relief, that is, the imposition of personal liability on respondents for the payment of money, Section 502(a)(3) did not authorize the action. *Id.* at 221.

Application of the legal principles from *Great-West Life* leads to the conclusion that the Plaintiff's claim in Count III is for legal relief and therefore is not authorized by Section 502(a)(3). The Plaintiff does not assert title to any particular property or funds in the possession of the Defendant. She does not seek a constructive trust or equitable lien on particular funds or property. The basis for her claim is not that the Defendant has any *particular* funds or property that belong to her, but that she is entitled to *some* funds or property from the Defendant. The court therefore concludes that the claim asserted in Count III seeks legal relief which is not authorized by Section 502(a)(3).[2]

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[2] If the Plaintiff argued that she seeks equitable relief by seeking an injunction to compel payment of backpay and the value of lost benefits, the relief sought no doubt would be considered legal under *Great-West Life.* If she seeks compensatory or punitive damages under Count III, such damages are not considered "appropriate equitable relief" and are thus not recoverable under Section 502(a)(3). *See Mertens,* 508 U.S. at 256; *Buckley v. Dement, Inc. v. Travelers Plan*

(Continued on following page)

The Plaintiff's attempts to distinguish *Great-West Life* are unavailing. She first argues that the basis for reimbursement there was a contract, whereas, here it is not. In explaining the difference between equitable restitution and legal restitution, the Court said that claims for legal restitution were viewed as breach of contract actions, whether or not the contract was actual or implied. *Great-West,* 534 U.S. at 213. Thus, an express contract is not required in order for a claim to seek legal relief.

The Plaintiff next argues that she seeks restitution, including reinstatement with backpay and benefits and the value of lost benefits. First, the Complaint does not seek reinstatement or benefits. Moreover, the fact that the Plaintiff seeks restitution is not enough to bring her claim within Section 502(a)(3). *See Great-West,* 534 U.S. at 212-18 (rejecting argument that claim was authorized under Section 502(a)(3) because petitioners sought restitution as not all claims for restitution are claims for equitable relief).

The Plaintiff also relies on footnote 4 of the *Great-West Life* majority opinion in claiming that backpay is an equitable remedy. This reliance is misplaced. The footnote responds to an argument by the dissent that Congress intended all restitution to be equitable relief under ERISA Section 502(a)(3). The majority indicated that the authorities relied on by the dissent to support that argument did not state that because backpay is restitutionary, it also is equitable. *Id.* at 218 n.4.

Admin. of Ill., Inc., 39 F.3d 784, 787 (7th Cir. 1994); *Harsch v. Eisenberg,* 956 F.2d 651, 660-61 (7th Cir. 1992).

The Plaintiff cites to the unpublished opinion of the district court in *Carnegie v. Mutual Savings Life Insurance Co.,* Civil Action No. CV 99-S-3292-Carnegie, 2002 U.S. Dist. LEXIS 21396 (N.D. Ala. Nov. 1, 2002), as support for her claim that the restitution she seeks, including payment of benefits, is equitable in nature. *Carnegie* does not assist the Plaintiff. First, no claim in that case was brought under ERISA Section 502(a)(3). Second, one claim was for a refund of premiums paid, which the court concluded constituted a claim to restore particular funds or property in the defendant's possession, making it an equitable claim. *Carnegie,* 2002 U.S. Dist. LEXIS 21396, [WL] at *52-53.

Finally, the Plaintiff cites to 29 U.S.C. § 1109, but for reasons which are not apparent to the court. She does not allege a breach of fiduciary duty by the Defendant, so it seems that this provision is inapplicable.

For the foregoing reasons, the Defendant's motion to dismiss Count III will be **GRANTED**.

ALL OF WHICH IS ORDERED this 20th day of May 2003.

John Daniel Tinder, Judge

United States District Court

2003 U.S. APP. LEXIS 25786

PRIMAX RECOVERIES, INCORPORATED, Plaintiff-Appellee, v. EDNA YOUNG, Defendant-Appellant.

No. 02-2115

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

July 29, 2003, Submitted
December 18, 2003, Decided

COUNSEL: Norris C. Ramsey, NORRIS C. RAMSEY, P.A., Baltimore, Maryland, for Appellant.

Brooks R. Amiot, David W. Stamper, PIPER RUDNICK, L.L.P., Baltimore, Maryland, for Appellee.

JUDGES: Before MICHAEL, TRAXLER, and KING, Circuit Judges.

OPINION BY: PER CURIAM:

Primax Recoveries, Inc. ("Primax") filed suit against Edna Young, seeking equitable and declaratory relief under the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1461 (West 1999 & Supp. 2003) ("ERISA"). After the parties filed cross-motions for summary judgment, the district court found Young sustained injuries in an automobile accident and her health care plan ("the Plan")[1] provided benefits. Young settled her claims with the tortfeasor for $25,000, and with her own

[1] Young was a participant of the Fresenius Medical Care North America Medical Plan, a health care plan sponsored by National Medical Care, Inc. Primax was an assignee of the Plan.

uninsured motorist carrier for $275,000. The district court granted Primax's motion for summary judgment, entered judgment in the amount of $154,830.74 and allowed Primax a constructive trust in that amount over funds held in trust by Young's counsel.

On appeal, Young argues Primax could not proceed under ERISA. Alternatively, Young argues Primax was not entitled to a constructive trust over the disputed funds and Maryland insurance law precluded Primax's attempt to seek reimbursement from those funds. Finding no error, we affirm.

This Court reviews an award of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). This Court views the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Under ERISA § 502(a)(3) a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

Whether restitution is a legal or equitable remedy depends on the basis of the plaintiff's claims and the type

of underlying remedies requested. *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 213, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002). A plaintiff could obtain restitution in equity, generally in the form of a constructive trust or equitable lien, when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* (citation omitted). When, however, the property or proceeds were dissipated so that no product remained, the plaintiff was considered a general creditor, and could not enforce a constructive trust or equitable lien. *Id.* at 213-14. "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

Because the funds at issue are within Young's possession, this case is distinguishable from *Great-West. See Bauhaus USA, Inc. v. Copeland,* 292 F.3d 439, 445 (5th Cir. 2002) (noting fact that defendants not in possession of disputed funds was "extremely important" in *Great-West*). Because Primax seeks a constructive trust on identifiable funds that they claim belong in good conscience to them, and those funds are in Young's possession, we find Primax properly proceeded under ERISA.

Young next argues Primax was not entitled to the disputed funds under the terms of the Plan. Young first argues that under the language of the Plan, Primax could only recover benefits received from the Plan that were related to her medical expenses. Although Young claims the funds sought by Primax were not intended to compensate her for medical expenses, Young's general release entitling her to the uninsured motorist proceeds did not specify any

particular purpose for the funds. Because the specific language of the Plan allows Primax to assert its rights as to unspecified settlements, and the uninsured motorist proceeds were not specified for any purpose, we do not find Young's after-the-fact characterization of the purpose of those funds creates a genuine factual dispute that precludes summary judgment.

Young also argues the uninsured motorist proceeds do not constitute a settlement from a third-party within the terms of the Plan. Assuming without deciding the Plan limited its recovery rights to third-party settlements, we find the uninsured motorist proceeds were such a settlement. *See, e.g., Bill Gray Enters. Inc. Employee Health & Welfare Plan v. Gourley,* 248 F.3d 206, 220 (3d Cir. 2001).

Lastly, Young contends Maryland insurance law precludes Primax from seeking reimbursement from her uninsured motorist proceeds.[2] Young notes Maryland provides a statutory scheme mandating automobile insurance. *See Van Horn v. Atl. Mut. Ins. Co.,* 334 Md. 669, 641 A.2d 195, 200-03 (Md. 1994). Because the statutory provisions provide for certain set-offs or reductions from motor vehicle insurance coverage, Maryland courts have invalidated insurance provisions that allow for other reductions to their motor vehicle insurance policies. *See, e.g., Lewis v. Allstate Ins. Co.,* 368 Md. 44, 792 A.2d 272, 275 (Md. 2002).

Young argues these statutory provisions preclude Primax from reaching her uninsured motorist proceeds.

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[2] Primax concedes ERISA does not preempt this provision.

However, Young relies primarily upon cases that concern when a motor vehicle insurance carrier may impose reductions or exclusions as to its coverage under Maryland's statutory scheme.[3] We find these cases to be inapposite. We therefore conclude that Maryland insurance law does not affect Primax's ability to reach Young's uninsured motorist proceeds.

Accordingly, we find the district court properly granted summary judgment in favor of Primax and affirm its order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

[3] Similarly, to the extent Young cites *Erie Ins. Co. v. Curtis*, 330 Md. 160, 623 A.2d 184 (Md.1993), we find it inapposite to these facts.